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A
Treatise on the Law of
VENDOR AND PURCHASER
OF
REAL ESTATE AND CHATTELS REAL.

*INTENDED FOR THE USE OF
CONVEYANCERS
OF EITHER BRANCH OF THE PROFESSION.*

BY
T. CYPRIAN WILLIAMS,
OF LINCOLN'S INN, BARRISTER-AT-LAW, LL.B.; FORMERLY LECTURER ON CONVEYANCING
TO THE INCORPORATED LAW SOCIETY OF THE UNITED KINGDOM,
Editor of "Williams on Real Property" and "Williams on Personal Property."

SECOND EDITION.

IN TWO VOLUMES.

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RJF 29 Sept 53

To the Memory of
MY FATHER AND MASTER IN THE LAW,
JOSHUA WILLIAMS,
SOMETIME ONE OF THE CONVEYANCING COUNSEL TO THE
COURT OF CHANCERY, AND AFTERWARDS ONE OF
HER LATE MAJESTY'S COUNSEL,
Whose wish it was that his Son should keep his name in
Remembrance in Lincoln's Inn,

This Book

IS AFFECTIONATELY INSCRIBED.

PREFACE

TO THE SECOND EDITION.



IN this edition are incorporated all the changes made in the law since the first publication of the book (*a*), and the whole of the text has been carefully revised. Besides these emendations, the author has been emboldened by the very kind and gratifying reception, which his treatise met with at the hands of the profession, to add a considerable amount of entirely new matter. This work, in its first edition, was originally planned on a smaller scale than that on which it was executed. But over ten years elapsed between the commencement of the book and its completion ; and the author, in the course of working out his design, was led to elaborate the later part of his treatise in a way which rather exceeded the proportions observed in the earlier chapters. The aim of the additions now made, which occur chiefly in the first half of the book, has been to harmonise those proportions with the lines on which the work was finished.

(*a*) Vol. i., containing Chaps. I.—XII., was published in October, 1903 ; a temporary volume, containing Chaps. XIII.—XVI., appeared in January, 1905 ; and vol. ii. in its entirety was published in April, 1906.

The writer is well aware how delicate a task the enlargement of a law book is, and knows that such an undertaking too often results in marring the symmetry and injuring the literary quality of the original work. But he has done his best to avoid these evils; and trusts that his additions have not damaged the book, but will make it more useful to the profession.

As the additions are much intermixed with the original text, it may be convenient to point out exactly what they are. The following matter is new:—The note (p. 4, n. (*m*)) on the question whether on the sale of land without naming the price the law implies an agreement to buy at a reasonable price; the examples stated on p. 6 of the sale of land by a general description (notes (*u—b*)), and the criticism in note (*b*) of the case of *Plant v. Bourne* (*b*); the whole paragraph on pp. 24—26 as to the inadvertent acceptance of a bidding lower than the reserve price, &c.; the paragraph on pp. 29, 30, as to alterations in the contract; the sentences on pp. 33—35, to which are annexed notes (*k, n* and *u*); the statements on p. 36 as to the remedies for breach of the contract; the sentences on pp. 37 and 39, to which are annexed notes (*a, c* and *k*); paragraphs (3) and (4) on pp. 44, 45 (these have been re-written); the paragraph on pp. 54, 55, as to re-sale as owner; the paragraph on pp. 69, 70, as to the stipulations left to be implied on sales by auction, and the sentences, to which notes (*g, h*) are an-

nexed, in the succeeding paragraph; the whole of p. 76; the paragraphs on pp. 78—83, as to special stipulations usually made in particular cases of sale by auction; the sentences on pp. 106, 107, as to the conveyance of an equity of redemption and a transfer of mortgage; that on p. 114 as to documents incorporated by reference; the paragraph on pp. 119, 200 as to title-deeds executed by attorney; those on pp. 124—130, as to title-deeds in the custody of a mortgagee or subject to a solicitor's lien; the sentence on p. 139 as to statements of fact in public documents and notes (*c*, *d*) thereto; that on p. 154 to which note (*f*) is annexed; the statements on pp. 155—159 as to presumptions; the statement at the end of note (*n*) to p. 166, calling attention to what seems to have been an oversight in the decision of Parker, J., in *Halkett v. Dudley* (*c*); note (*y*) to p. 168; the sentences on pp. 176, 177, to which notes (*c*, *d*, *o*, *p*, *q*, *r*) are annexed; those on pp. 183, 184, to which notes (*y*, *z*, *e*, *f*) are annexed; the last half of p. 185 from "It is held," and notes (*k*, *l*) thereto, the latter note containing a criticism of the grounds alleged by Parker, J., in *Halkett v. Dudley* (*d*), for the purchaser's right to repudiate the contract at once, if the vendor fail to show a good title; the sentence on p. 187 to which note (*n*) is annexed; the last two sentences on p. 191; the sentence on p. 244, to which note (*l*) is annexed; that on p. 264, to which note (*i*) is annexed; that on

p. 267, to which note (*d*) is annexed ; p. 269 down to note (*o*) ; note (*d*) to p. 294, dealing with the execution of powers by will ; the statements on pp. 297, 298, as to the exercise of powers to appoint land amongst unborn issue ; the paragraph in the middle of p. 299 ; the first sentence on p. 317 ; pp. 318—327, dealing with the law expounded in *Re Dickinson and Kelsall's Contract* (*e*), as to a tenant for life's power of conveyance under the Settled Land Acts, &c. ; the latter half of p. 329 from "It is submitted" to the end of p. 331 ; the sentences on pp. 332, 333, to which notes (*n*, *o*, *s*) are annexed ; that on p. 339, to which note (*a*) is annexed ; the paragraph on pp. 344, 345, as to sale by the mortgagee's attorney ; that on pp. 349, 350, as to fines on admittance after the death of an unadmitted surrenderee ; pp. 363—372, dealing with the sale of renewable leaseholds, satisfied terms, merger of terms, enlarged terms, leaseholds settled to go with freeholds, options to purchase contained in leases, and reversionary leases ; note (*k*) to p. 374 ; note (*z*) to p. 377 ; the sentences on p. 379 to which notes (*n*, *o*, *p*) are annexed ; the statements in note (*p*) to p. 385, discussing the criticism made in the "Law Quarterly Review" on a passage in the text ; pp. 386 (from "It is also desirable") to 393 (end of § 3), dealing principally with the possibility of evading compulsory registration of title ; so much of pp. 396—398 as relates to the changes made by the Finance (1909-10) Act, 1910 ;

(*e*) 1908, 1 Ch. 213.

the paragraph on pp. 400, 401, as to sale of the reversion on a lease, where succession duty is payable at the end of the term, &c. ; pp. 403, to the end of the first paragraph on p. 405 ; pp. 409 to 433, dealing with allotments, exchanges, mines, roads, rivers, water rights, fishing and sporting rights, wastes, rights of support, undivided shares in land, and trusts for conversion ; the sentence on p. 436 as to the release of part of land subject to a rent seck ; note (*z*) to p. 446, as to the meaning of “ an assurance ” ; pp. 456—459, discussing the question whether a contract to sell land to a charity is an assurance within the meaning of the Mortmain and Charitable Uses Acts, 1888 and 1891 ; the first paragraph on p. 465 ; pp. 469, 470, as to the power of a surviving partner to sell or mortgage the lands of the firm ; pp. 482—487, as to marshalling securities, clog on redemption and mortgages to moneylenders ; pp. 489, 490, as to compensation for non-renewal of licences ; the sentence on p. 491 to which note (*p*) is annexed, and notes (*q*, *r*) to that page ; those parts of notes (*t*, *u*) to p. 492 which deal with the case of *Re Nisbet and Potts' Contract* (*f*), and lands taken under the Lands Clauses Act, 1845 ; the statement in note (*y*) to p. 493 ; note (*p*) to p. 532 ; the sentence on p. 546 to which note (*y*) is annexed ; those on p. 551 to which notes (*c*, *e*, *f*) are annexed ; the statements on pp. 559, 560, as to execution against the purchaser ; those on p. 580 as to the acceptance of title by not sending in

requisitions in time; notes (*x*, *y*) to pp. 599, 600; note (*l*) to p. 616; the sentence on p. 617 to which notes (*q*, *r*) are annexed; that on p. 624 to which note (*y*) is annexed; pp. 630 from “We have seen” to 633 and note (*m*) to p. 634, discussing the questions raised in the recent case of *Re Sansom and Narbeth’s Contract* (*g*) as to the purchaser’s right to conveyance by reference to a plan; the sentence on p. 635 to which note (*v*) is annexed; the second sentence in note (*t*) to p. 650; those on p. 668 to which notes (*r*, *s*) are annexed; the last three sentences in note (*s*) to p. 678; the paragraph on p. 684 as to solicitor’s lien; the statements on pp. 696, 697, as to the new stamp duties; pp. 706—712 relating to increment value duty; note (*p*) to p. 713 as to the taxes on land; note (*z*) to p. 733 as to solicitors’ remuneration; the last part from “The case of *Re Meyer*” of the note on p. 752; the sentence on p. 753 to which note (*n*) is annexed; the statements on pp. 790, 791, as to the case of *Thompson v. Hickman* (*h*); the sentences on pp. 829, 830, to which notes (*b*, *d*, *c*) are annexed; the latter half of note (*p*) to p. 842; the sentence on p. 843 to which note (*y*) is annexed; that on p. 856 as to stipulations in general restraint of alienation and note (*b*) thereto; and the paragraph on p. 865 as to the sale of land for the use of a charity. Altogether the fifteen chapters now included in the first volume contain one hundred and thirty-five pages more than in the first edition.

Owing to the proposed enlargement of the table of cases, which will expand the size of the second volume, Chapters XIII. to XV., on Mistake, Misrepresentation, &c. and Illegality, are in this edition transferred to the first volume. In connexion with the subject of Mistake, the author may point out that the theory, which he has adopted, as to the law of Mistake in relation to contract, is supported by the recent cases of *Re Meyer* (*i*) and *Hood v. McKinnon* (*k*); see pp. 749, 750 and note (*i*). He also submits that his criticism of the doctrine applied in *Davies v. Fitton* (*l*) and *May v. Platt* (*m*) has since been justified by the judgment of Neville, J., in *Thompson v. Hickman* (*n*); see pp. 786—791. The writer may also cite the authority of the same learned judge in *Beale v. Kyte* (*o*) in support of his criticism of the case of *Bloomer v. Spittle* (*p*); see pp. 794—801, 796, n. (*r*).

The long delay in passing the Finance (1909-10) Act, 1910, made it impossible to keep the section on the Death Duties in the place allotted to it in the first edition (Chap. VII. § 2). This section has therefore been moved into the second volume, and will be printed at the end of it as a separate chapter

(*i*) 1908, P. 353.

(*k*) 1909, 1 Ch. 476.

(*l*) 2 Dru. & War. 225.

(*m*) 1900, 1 Ch. 616. This doctrine is that the Court will not grant, at suit of a plaintiff, the rectification of an agreement in

writing together with specific performance of the agreement as rectified.

(*n*) 1907, 1 Ch. 550.

(*o*) 1907, 1 Ch. 564.

(*p*) L. R. 13 Eq. 427.

(Chap. XXI.). The Appendix, which will contain some additional forms, has also been transferred to the second volume.

As in the first edition, the tables of cases and statutes, as well as the general index, will be placed at the end of the second volume. In this edition, however, references to all the reports will be given in the table of cases; and a separate index will be added of the defendants' names in the cases cited. The general index will also be thoroughly revised and enlarged.

The entire work of correcting the press for this edition has been undertaken by the author's former pupil, Mr. H. ERNEST GLAISYER, of Lincoln's Inn, who is also responsible for the table of contents, and is engaged in preparing the tables of cases and statutes and the general index.

The *Addenda* to this volume contain cases reported whilst it was in the press, and include those reported in the Law Reports for October, 1910.

7, STONE BUILDINGS, LINCOLN'S INN,
12th October, 1910.

INTRODUCTION

TO THE

FIRST VOLUME OF THE FIRST EDITION.

THE writer can hardly put forward a treatise on the law of Vendor and Purchaser of Land without an apology for adventuring upon the field successively occupied by so eminent a Real Property lawyer as Lord St. Leonards, and a writer of such profound knowledge of conveyancing and great literary skill as Mr. Dart. His excuse is that so many years have elapsed and so many and great changes have been made in the law, not only since Mr. Dart first wrote, but even since he himself supervised an edition of his book, that there appears to be room for a re-statement of the principles of the law of sale of land from the standpoint of the present time. Such a statement of the law it has been the writer's aim to make ; and he has particularly endeavoured to give a readable account of it.

This book is intended for the use of those engaged in the practice of conveyancing, whether as counsel or solicitors. Its design has therefore been to discuss the incidents of a contract for the sale of land as they are usually presented to the notice of conveyancers ; that is to say, in order of time. And the scheme of the work is to treat first of the normal course of such a contract, where it has been made between persons of full capacity and is duly brought to completion, and to examine afterwards the grounds for avoiding the contract, such as incapacity, mistake, fraud or misrepresentation, and the remedies to be pursued in case of its breach. Thus the book begins with a statement of the law relating to the formation of a contract for the sale of land. It then gives a brief general account of the rights, obligations and remedies of the parties who

have concluded such a contract; and the terms of an open contract are particularly set out (*a*) in the same form in which the special provisions of a contract for sale are usually expressed. After this, the usual conditions of sale are dealt with; and the reader's attention is then directed to the vendor's obligation to show a good title and its discharge. The subject of the investigation of title is considered, first generally, and afterwards with regard to a variety of special points or subjects, all of which are of constant occurrence in the work of advising on title. In selecting the subjects to be so discussed and in determining upon their mode of treatment, the writer has necessarily had to take into account the exigencies of the law and practice at the present time; and he has often been constrained to deal at some length with topics which may be thought to be ephemeral, and which would be disposed of by a statement of very different proportion, if he could regard nothing else than the ideal form of a literary composition. Thus he has devoted the whole of one chapter to the subject of devolution on death, and the death duties (*b*), regarded from the conveyancer's point of view. But his reason is that on these subjects the law has been so lately recast by the Land Transfer Act, 1897, and the Finance Acts, that its interpretation has not yet been settled; whilst the questions which are raised by these statutes occur upon almost every title. At the end of the dissertations on particular points arising on the investigation of title, or on particular titles, the main thread of the discourse is again taken up in the chapter on the effect of the contract pending completion. This is followed by an account of the completion of the contract, dealing with the acts to be performed from the time of the acceptance of the title down to the execution of the conveyance.

At this point the first volume concludes (*c*), the reader having been conducted throughout the whole of the normal course of a contract for the sale of land. In the second volume it is proposed to treat of the parties' position after completion (as with regard to a want of title not ascertained until after that time) and with the avoidance of the contract and the remedies for the breach thereof, as already mentioned. The second volume will also include a chapter on the sale of registered land, a subject which would have been

(*a*) Pp. 39, 41 *sq.*

(*b*) See above, p. xi.

(*c*) See above, pp. v, n., xi.

considered in the present volume, but for the delay in promulgating the new Land Transfer Rules.

The writer has not attempted to compile an encyclopædia of the law of sale of land. His object has been rather to treat of the main principles of the law and practice incident to such sales than to note every special circumstance which may possibly attend them. His belief is that a sound knowledge of these principles is by far the best aid to the solution of the particular problems which are encountered in practice. And his hope is that, in this respect, his book may be found a useful guide to those gentlemen who are obliged (as constantly happens in small transactions) to advise on difficult questions of conveyancing without the assistance of counsel.

Perhaps the writer may be allowed to say that he has not avoided the discussion of points of law or practice, which are not exactly covered by decided cases, or settled by the opinion of conveyancers or text writers of acknowledged eminence: nor has he hesitated to criticise judicial decisions or *dicta*, which appear to him to be of questionable authority. Thus, he has discussed the following amongst other questions:—Whether, after the acceptance of a bidding at an auction, either party can revoke the authority conferred by him upon the auctioneer to sign a memorandum of the contract (*d*); whether the purchaser's right to a good title is an implied term of the contract or a collateral right (*e*); whether a vendor under an open contract has the right of re-sale on the purchaser's failure to observe the terms of the contract (*f*); whether a voluntary conveyance is a good root of title under an open contract (*g*); at what time the purchase-money is payable on a sale of land situate in a compulsory registration district (*h*); and to what extent the usual remedies for securing payment of a rent-charge in fee are obnoxious to the rule against perpetuities (*i*). He has tried to elucidate the mystery of what is called "the compound settlement" in connection with sales under the Settled Land Acts (*k*), and he has respectfully protested (*l*) against the decision in the late case of *Re Cornwallis West and Munro's Contract* (*m*). He has

(*d*) P. 21, n. (*r*).

(*e*) P. 32, note.

(*f*) Pp. 51—53.

(*g*) P. 109.

(*h*) P. 385 and n. (*p*).

(*i*) Pp. 435, 436, 674—679.

(*k*) Pp. 310 *sq.*

(*l*) Pp. 314—316.

(*m*) 1903, 2 Ch. 150.

likewise considered the important point—on which, he is aware, his is *vox clamantis in deserto*—whether a conveyance by a tenant for life under the Settled Land Acts can override a mortgage by the remainderman (*n*). And he has adverted to the difficulties now raised where a limited owner pays estate duty out of his own pocket and so becomes entitled to a charge for the amount paid (*o*); with regard to the charge of estate duty on the death of several joint mortgagees not appearing to be trustees (*p*); where a purchaser receives notice of some unregistered process of execution (*q*); and with regard to the effect of orders made in exercise of bankruptcy jurisdiction in creating a charge on land (*r*). He has suggested (*s*) that the assignee of part of land let on lease, who pays the rent for the whole under threat of distress, may have a remedy which was overlooked in the case of *Johnson v. Wild* (*t*). And he has criticised the decisions in *Bolton v. London School Board* (*u*), *Re Selous* (*x*), *Re Williams and Newcastle's Contract* (*y*) and the late case of *Re Highett and Bird's Contract* (*z*). Besides this, he has inquired into the advantages of official over private searches (*a*). He has made a strong effort to convince his readers of the great hardship which may befall a purchaser by private contract, whose advisers tamely submit to the incorporation in the contract of the conditions usual on London sales by auction (*b*). He has dealt with the subject of the investigation of title in view of a mortgage (*c*). And he has treated at some length of the law of restrictive covenants (*d*), a subject on which many important decisions have been given during the last few years, and on which the latest leading case (*e*) is of such recent date that it has not yet been reported in the Law Reports. He has moreover taken account, from the outset (*f*), of the additional burthen laid on conveyancers'

(*n*) See p. 319, n. (i).

(*o*) See Chap. XXI.

(*p*) Pp. 242–245.

(*q*) P. 584.

(*r*) P. 386.

(*s*) P. 362.

(*t*) 44 Ch. D. 146.

(*u*) 7 Ch. D. 766; below, p. 137, n. (*p*).

(*x*) 1901, 1 Ch. 921; see p. 466, n. (*z*), below.

(*y*) 1897, 2 Ch. 144; see p. 681, below.

(*z*) 1902, 2 Ch. 214; 1903, 1 Ch. 287; see p. 354, below.

(*a*) Pp. 605 sq.

(*b*) Pp. 83–93.

(*c*) P. 498.

(*d*) Pp. 491 sq., 647, 666, 670, 674.

(*e*) *Foranby v. Barker*, C. A. (July 14), 1903, W. N. 133; 72 L. J. Ch. 716; 51 W. R. 646.

(*f*) Pp. 38, 39, 88, 204–208.

shoulders by the development of the doctrine, which culminated (*g*) in the extraordinary case of *Scott v. Alvarez* (*h*).

It is hoped that this book may be useful, not only to practitioners but also to students preparing for conveyancing practice in either branch of the profession. With this object the author has endeavoured, throughout the work, to write in a manner intelligible to those who have no greater preliminary knowledge of the subject than an acquaintance with the elements of the law of real property and of contract. He may point out that the earlier part of his treatise (Chapters I.—V.), which gives a general account of the subject, is especially adapted to the use of students, and that it is designed to prepare them to understand the rest of the book, in which matters of interest to practitioners are more particularly dealt with. The writer has started with the assumption that his readers will at least have such an acquaintance with the law of real property as may be gathered from a text-book like “Williams on Real Property”; and he has not thought it necessary to repeat here descriptions of those parts of the law, which are explained in that book in an elementary way. Thus he has not inserted an account of the historical progress of the law of creditors’ rights (*i*) as an introduction to his discourse about searches (*k*). But he has tried throughout so to treat his subject that readers may understand, who have no greater knowledge than this.

(*g*) This doctrine appears to have originated with the case of *Best v. Hamand* (1879), 12 Ch. D. 1; see Fry, *Sp. Perf.* § 1325, p. 592, 3rd ed.

(*h*) 1895, 1 Ch. 596; 2 Ch. 603. This case must have shattered the last ruins of the delusion that law and equity were fused by the Judicature Acts. It appears in truth to be equally destructive of the pretensions put forward by eminent judges (see p. 58, n. (*n*), below), that a contract is really construed in the same manner in equity as at law. In the days when the Courts of Common Law and Chancery were separate, the student’s curiosity used to be stimulated by the statement that “on one side of West-

minster Hall a man may succeed in his suit under circumstances in which he would undoubtedly be defeated on the other side” (*Wms. Real Prop.* 129, 1st ed.; 177, 13th ed.). But this apparent paradox is eclipsed by the judicial ruling that, in the same Court and cause and in a matter depending on the effect of the same stipulation in the same contract, a suitor may at the same time obtain and be denied substantial relief according as his claim is rested on the doctrines of equity or of law.

(*i*) See *Wms. Real Prop.* Chap. XI., 21st ed.

(*k*) Below, p. 580.

The writer is conscious of many imperfections in his treatise, and for these he must ask the indulgence of the profession. He has been occupied with the task of its production for several years; but he has only been able to prosecute his undertaking during such time as he could spare from his other work. He will be much obliged if readers, who discover mistakes or omissions, will kindly inform him of them.

Mr. J. F. Iselin is responsible for the correction of the press, except as regards pp. 1—128; and he has undertaken the work of preparing the Index. He has also supplied the writer with many valuable notes for the preparation of Chapter XI., and is affording him the like assistance with regard to certain parts of the second volume. The author has endeavoured to make up for the absence of the Index from Vol. I. by using particular care in compiling the Table of Contents, and by inserting therein references to the pages under each heading.

7, STONE BUILDINGS, LINCOLN'S INN,

8th October, 1903.

The following paragraph, relating to Chaps. XIII. to XV., now included in the First Volume (l), originally formed part of the Introduction to the Second Volume.

The writer may mention that at the very outset he has found himself beset with many doubts and difficulties as to the true theory of English law with respect to mistake as a ground of avoiding the contract. The view he has put forward is warranted, he believes, by the English authorities; and it is supported by the statements made by the late Mr. Benjamin's classical treatise on Sale. On the other

(l) See above, p. xi.

hand, it seems to conflict with the opinion maintained by Mr. Justice O. W. Holmes, of the Supreme Court of the United States, who is perhaps the most brilliant and original of all living writers on the Common Law, and with that adopted by Professor Holland. And it is with extreme diffidence that the writer ventures to criticise their conclusions (*m*). The question, how far mistake is available, either as a ground of avoiding a contract for the sale of land at law, or of resisting its specific performance in equity, was raised in an acute form in the recent case of *Van Praagh v. Everidge* (*n*), which unfortunately went off in the Court of Appeal on the point of non-compliance with the 4th section of the Statute of Frauds. The writer has fully discussed the case in both of these aspects (*o*). Another difficult point, relating partly to the law of mistake and partly to that of misrepresentation, is the effect upon the contract at law and in equity of non-disclosure by the vendor of a latent defect of quality, of which he is aware; and the authorities on this point have been carefully considered (*p*). A full examination has been made of the questions, whether one may well claim the rectification of a written executory agreement together with the specific performance of the agreement as rectified (*q*), and whether rectification ought ever to be granted where the mistake has been unilateral and not common to both parties (*r*). In

(*m*) See pp. 750, 751, and note (*i*).

(*n*) 1902, 2 Ch. 266; 1903, 1 Ch. 434.

(*o*) Pp. 761, 726, 776 and note (*c*).

(*p*) See pp. 764—768.

(*q*) Pp. 786—791.

(*r*) Pp. 793—802.

connection with these questions, the cases of *May v. Platt* (*s*), *Garrard v. Frankel* (*t*), *Harris v. Pepperell* (*u*), *Bloomer v. Spittle* (*x*), and *Paget v. Marshall* (*y*) have been criticised. Under the head of fraudulent misrepresentation, the much discussed case of *Cornfoot v. Fowke* (*z*) has been considered; and it is suggested that the decision there given may yet be in point where an agent has innocently and without express authority made a false statement as to some fact, on which his principal was accurately informed, and it is sought on this ground to set aside the contract after completion (*a*).

(*s*) 1900, 1 Ch. 616.

(*t*) 30 Beav. 445.

(*u*) L. R. 5 Eq. 1.

(*x*) L. R. 13 Eq. 427.

(*y*) 28 Ch. D. 255.

(*z*) 6 M. & W. 358.

(*a*) Pp. 820 and note (*t*), 823, 824.

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Vendor must produce evidence of documents in official custody	Recital in a public statute or document
Expense of proving documents not in vendor's possession	Statutory declarations
Evidence of public document	Recitals in deeds of other documents
Examined copy	When the document is lost
Exemplification	Recitals of fact do not excuse vendor from proof
Office copies	Acceptance of irregular evidence
Certified copies	Great importance of verification of the abstract
Proper place for verification of the abstract	And of the examination of the deeds with the abstract
Expense of examining title deeds not in vendor's possession	Proof of identity of property
Deeds in possession of vendor's mortgagees, or other persons than vendor	Evidence of particular matters
Mortgagor's right of access to deeds in possession of mortgagee	Acknowledgment
Where vendor has a mere right to production	Act of Parliament
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ABBREVIATIONS.

- Fry, Sp. Perf. . . Fry on Specific Performance. The 3rd edition, the last revised by Sir Edward Fry himself, is referred to: but the paragraphs cited have the same numbering in the 4th edition.
- Dart, V. & P. . . The 5th edition, the last revised by Mr. Dart himself, is cited as an authority, but references are given to the parallel passages in the 6th and 7th editions.

ERRATUM.

Page 616, n. (l). . . For *Huckerby* read *Hucklesby*.

ADDENDA.

Page

- 5, note (r).....Add, "See also *Commings v. Scott*, L. R. 20 Eq. 11."
- 11, note (f)Add at end, "*Humphries v. Humphries*, 1910, 2 K. B. 531."
- 19, note (d).....After *Rossiter v. Miller*, insert "*Filby v. Hounsell*, 1896, 2 Ch 737," and after *Winn v. Bull*, add "*Santa Fé Land Co. v. Forestal, &c. Co., Ltd.*, 26 Times L. R. 534."
- 35, line 3After "title," add a note, "*Cozens-Hardy, M. R., Re Taylor*, 1910, 1 K. B. 562, 571, 572."
- 47, after line 8 ..Add, "(4) The vendor shall, before the completion of the purchase, do what is requisite on his part for enabling the purchaser to procure the contract or the conveyance to be stamped with the appropriate increment value duty stamp; see stat. 10 Edw. VII. c. 8, ss. 1, 4, 11; below, pp. 696, 705—712."
- 64, line 20Add a note, "*Cozens-Hardy, M. R., Re Taylor*, 1910, 1 K. B. 562, 571, 572."
- 159, note (c).....Add at end, "*Re Hoyles*, 1910, 2 Ch. 333, 341."
- 165, note (g).....Add, "*Re Hucklesby & Atkinson's Contract*, 102 L. T. 214, 217, where it appeared that the vendor was entitled under an uncompleted contract of purchase."
- 224, note (x).....Add, "The heir or devisee of land charged by will with debts and also with legacies or annuities could give a good discharge to a purchaser or mortgagee without the concurrence of the legatees or annuitants: but if the land were charged with legacies or annuities only, the concurrence of the legatees or annuitants was necessary in order to sell or mortgage the land free from their charge; see *Jebb v. Abbott*, Co. Litt. 290 b, note (1), sect. xiv. 3; *Horn v. Horn*, 2 S. & S. 448; *Johnson v. Kennett*, 3 My. & K. 624, 630; *Page v. Adam*, 4 Beav. 269; Sug. V. & P. 658; *Williams on Real Assets*, 62—64; *Wms. Real Prop.* 223, 13th ed. (261, 262, 21st ed.); *Re Rebbeck*, 63 L. J. Ch. 596; *Re Henson*, 1908, 2 Ch. 356."
- 294, n. (d), line 10..Add after *Pepin v. Bruyère*, "*Re Hoyles*, 1910, 2 Ch. 333, 341."
- 297, note (t).....Add, "*Cloutte v. Storey*, 1910, W. N. 163, 103 L. T. 131."
- 359, note (f), 2nd column, 4th line..After *Jenkins v. Price*, add "*Willmott v. London Road Car Co. Ltd.*, C. A., 1910, W. N. 209, reversing *S. C.*, 1910, 1 Ch. 754."
- 361, note (t).....*Willmott v. London Road Car Co. Ltd.*, has been reversed in the C. A.; 1910, W. N. 209.
- 450, note (s).....Add, "*Re Hoyles*, 1910, 2 Ch. 333."

THE LAW

RELATING TO

VENDOR AND PURCHASER OF LANDS.

CHAPTER I.

OF THE FORMATION OF THE CONTRACT OF SALE.

THE subject of the present treatise is the sale of real estate and chattels real, or the formation and completion of contracts for the conveyance of land or other hereditaments in consideration of a price in money (*a*).
Now in order to create a valid contract, that is, an agreement enforceable at law, it appears that there must be :—

Sale defined.

Requisites of a valid contract.

- (1.) Due capacity to contract on the part of the persons entering into the agreement ;
- (2.) The expression by all parties of a common intention to create an obligation binding some or one of them ; that is, an intention that some or one of them should do or forbear something affecting their legal relations for the benefit of the others or other of them ;
- (3.) Due compliance with the forms or the presence of other matter required to make a promise enforceable by English law, beyond the mere expression of a common intention ;

(*a*) See Wills, J., *J. & P. Coats v. Commissioners of Inland Revenue*, 1897, 1 Q. B. 778, 783.

- (4.) Nothing unlawful in the object of the agreement;
- (5.) True, full and free consent of the parties; that is, consent unimpeachable as having been induced through mistake, misrepresentation, fraud, duress or undue influence (*b*).

Capacity.

General capacity to buy or sell land.

Exceptions—

Applying ourselves to the first of these elements of contract, it is to be observed that, in order to form a valid contract for the sale of land, the parties must have, not only capacity to make contracts generally but also due capacity to buy and sell land. As a general rule, all natural persons enjoy either capacity: but there are exceptions in the case of infants, persons of unsound mind, drunken persons, married women and convicts. Outlaws, too, and alien enemies are disabled by their incapacity for bringing actions from enforcing though not from making contracts (*c*). And corporations are limited in their capacity for buying and selling land (*d*). There are also cases in which the formation of an unimpeachable contract for the sale of land is prevented by the relation existing either between the vendor and purchaser, as in the instances of solicitor and client, trustee and *cestui que trust*, or between one party to the sale and the beneficial owner of the land or money dealt with, as where a man exercising a trust or power to sell or purchase land endeavours in the one case to buy the land himself, or in the other to sell his own land for the purpose (*e*).

—reserved for future consideration.

All these exceptional cases are reserved for subsequent consideration; and it is proposed first to examine the formation, incidents and usual course of a contract for sale of land made between persons of full contractual capacity; and to treat afterwards of any grounds for

(*b*) Wms. Pers. Prop. 158, below, Chap. XVI.
16th ed.

(*c*) Bac. Abr. Outlawry, D. (3),
Aliens, D.; Co. Litt. 129 b. See

(*d*) See below, Chap. XVI.

(*e*) See below, Chap. XVII.

impeaching the contract. For the present therefore we will pass over the first, fourth and fifth of the above-mentioned elements of a valid contract, and devote our attention to the second and third, namely, the expression of consent, and its form.

The common intention or consent of the parties to an agreement may be expressed either by their uniting in a set form of written or spoken words, or by the acceptance by some or one of them of an offer made to them or him by the others or other of them (*f*). As to the forms or other matter required to make a promise enforceable by English law beyond the mere expression of a common intention, the main rule is that the contract must be evidenced by deed or else there must be a consideration for the promise (*g*). In contracts for the sale of land the element of consideration is always present. The promise on the vendor's part to convey the land to the purchaser is made in consideration of the purchaser's promise to pay the price, and *vice versa*. So that a contract for sale of land, though it be not made by deed, fulfils the requirements of English law, in so far as consideration is essential to its validity. A contract for sale of land is however one of those contracts on which the law imposes a requisite of form besides the element of consideration. For by the fourth section of the Statute of Frauds (*h*), no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized. So that *writing* and *signature by the party to be charged or his agent* are

Expression of
consent.

Form.

(*f*) Wms. Pers. Prop. 160,
16th ed.

(*g*) Ibid. 161.

(*h*) Stat. 29 Car. II. c. 3.

necessary to make a contract for the sale of land enforceable at law (*i*).

The whole agreement must appear from the writing.

Contracts for the sale of land are generally concluded, on a sale by private treaty, by the signature by both parties or their agents of a formal written contract; and on a sale by auction, by the purchaser or his agent signing a memorandum embodying formal conditions of sale, which the auctioneer also signs as agent for the vendor. But such contracts may also be established by informal written memoranda or letters signed by the party to be charged therewith or his agent. So that a binding contract may result from the acceptance in writing duly signed of an offer to sell land. It is essential, however, whether the writing given in evidence be of a formal or an informal nature, that the terms of the agreement sought to be proved thereby should be sufficiently ascertained therein (*j*). The parties to the contract (*k*) and the property to be sold must therefore be sufficiently described (*l*), and the price, or the means of ascertaining it, be stated (*m*);

(*i*) The writing required by the fourth section of the Statute of Frauds need not be executed with pen and ink; the note of the agreement may be made in pencil or print, by engraving, lithography or photography, or "in any other mode of representing or reproducing visible words." And the signature of the party to be charged or his agent may be affixed by any similar means. See *Schneider v.*

Norris, 2 M. & S. 286; *Geary v. Physic*, 5 B. & C. 234; *Bennett v. Brumfitt*, L. R. 3 C. P. 28; *Dench v. Dench*, 2 P. D. 60; *Tourret v. Cripps*, 48 L. J. N. S. Ch. 567; stat. 52 & 53 Vict. c. 63, s. 20.

(*j*) *Seagood v. Meale*, Prec. Ch. 560; *Wain v. Warlters*, 5 East, 10; *Blagden v. Bradbear*, 12 Ves. 466, 471.

(*k*) *Williams v. Lake*, 2 E. & E. 349.

(*l*) See next paragraph.

(*m*) *Milnes v. Gery*, 14 Ves. 400; *Elmore v. Kingscote*, 5 B. & C. 583, 584; *Morgan v. Milman*, 3 De G. M. & G. 24. It is thought that the rule applying to the sale of goods, that in the absence of express agreement as to the price the law implies an agreement to buy at a reasonable price (*Hoadley v. McLaine*, 10 Bing. 482, 487; *Joyce v. Swann*, 17 C. B. N. S. 84, 102; stat. 56 & 57 Vict. c. 71, s. 8 (2)), has no application to the sale of land. This rule appears to have been laid down with respect to commodities so regularly sold that the market or the usual price is easily ascertainable. With regard to land, the law of specific performance of contracts to sell it is founded on the principle that the advantage of the possession of a

and any other terms of the bargain (except, of course, such as are implied by law, as that a good title shall be shown (*n*)) must be defined (*o*).

With regard to the question, What is a sufficient description of the parties to the contract, or the property to be sold? the rule is *id certum est quod certum reddi potest* (*p*). Thus a man may be sufficiently identified by reference to some character which he fills, if there can be but one answer to the inquiry, To whom does the description apply (*q*)? So that the description of a vendor as the proprietor, owner or mortgagee of certain land is good enough (*r*). But if the description be so vague that it does not necessarily apply to some particular person, it is insufficient. Thus it is not

Description
of the parties.

particular piece of land may be inestimable, and no amount of money may be assessable as an exact equivalent for it; *Adderley v. Dixon*, 1 S. & S. 607, 610; *Falcke v. Gray*, 4 Drew. 651, 657; *Hexter v. Pearce*, 1900, 1 Ch. 341, 346; see below, Chap. XIX. s. 3. An express agreement to buy land at its fair value is, however, valid, and would, it seems, be specifically enforced; *Grant, M. R., Milnes v. Gery*, 14 Ves. 400, 407; *Cranworth, C., Morgan v. Milman*, 3 De G. M. & G. 24, 34; *Sug. V. & P.* 287. And an agreement to buy at the fair value of the land may be inferred from the terms of the memorandum; see *Gregory v. Mighell*, 18 Ves. 328, 333, 334; *Gourlay v. Somerset*, 19 Ves. 429, 431. But it is submitted that, if the memorandum do not specify the price or the means of ascertaining it, and contain no evidence of an intention to sell at a fair price, it is insufficient to prove a contract of sale. It is quite clear that, where the price is in fact agreed upon, it must be mentioned in the memorandum; *Elmore v. Kingscote*, *ubi sup.*; *Re Kharaskhoma, &c. Syndicate*, 1897, 2 Ch. 451, 464, 467. Where the parties intend that a particular piece of land shall be the object of an agreement of sale between them, but have not determined whether the price shall be (1) a definite sum of money, or (2) a sum to be ascertained in some specified manner, or (3) a sum equivalent to the fair value of the land, it is thought that their agreement as to the sale rests incomplete, and does not amount to a contract legally enforceable.

(*n*) See *Fowle v. Freeman*, 9 Ves. Ch. 613.

351.

(*o*) *Couper v. Hood*, 26 Beav. 293; *Van Praagh v. Everidge*, 1903, 1 Ch. 434.

(*p*) *Rossiter v. Miller*, 3 App. Cas. 1124, 1141.

(*q*) *Potter v. Duffield*, L. R. 18 Eq. 4, 7; *Carr v. Lynch*, 1900, 1

(*r*) *Sale v. Lambert*, L. R. 18 Eq. 1; *Rossiter v. Miller*, *ubi sup.* So the descriptions "the executors of A." (*Hood v. Lord Barrington*, L. R. 6 Eq. 218), "a trustee for sale of certain property" (*Catling v. King*, 5 Ch. D. 660) have been held sufficient.

Description
of the
property.

enough to describe the party to a contract of sale as the vendor of certain property, or as the client or friend of a named agent (*s*). The same general rule is applied in determining the sufficiency of the description of the property sold, parol evidence being admissible in either case to elucidate the description (*t*). Thus in a written agreement for the sale of Mr. Ogilvie's house (*u*), or Trogues Farm (*x*), or the Ashford Hall Estate (*y*), or of the property sold on a day specified at the Sun Inn, Pinxton (*z*), the land sold is ascertained with sufficient certainty to make the contract valid and enforceable; and it may be shown by oral evidence what land in fact answers to each particular description. So also "the property in Cable Street" has been admitted to be equivalent to all the vendor's property in Cable Street, and so sufficient to uphold the memorandum (*a*). And it has even been held that a memorandum of sale between two persons named at a price specified of "twenty-four acres of land at Totmonslow" contained a description sufficiently ascertaining the land sold to satisfy the Statute of Frauds (*b*).

Plant v.
Bourne.

(*s*) *Potter v. Duffield*, ubi sup.;
Jarrett v. Hunter, 34 Ch. D. 182;
Lavery v. Pursell, 39 Ch. D. 508,
518.

(*t*) *Ogilvie v. Foljambe*, 3 Mer.
53; *Shardlow v. Cotterell*, 20 Ch. D.
90, 98; *Plant v. Bourne*, 1897, 2 Ch.
281.

(*u*) *Ogilvie v. Foljambe*, 3 Mer.
53, 61.

(*x*) *Goodtitle d. Radford v.*
Southern, 1 M. & S. 299.

(*y*) *Ricketts v. Turquand*, 1 H.
L. C. 472, 487, 493.

(*z*) *Shardlow v. Cotterell*, 20 Ch.
D. 90.

(*a*) *Bleakley v. Smith*, 11 Sim.
150, where note that the only
question argued and determined
was as to the sufficiency of the
vendor's signature.

(*b*) *Plant v. Bourne*, C. A., re-
versing *Byrne, J.*, 1897, 2 Ch.

281. In that case the quantity
mentioned was all the land the
vendor had there, and he had
shown the purchaser over it just
before the contract was signed.
The C. A. admitted oral evidence
of these facts on the ground that
the description in the memoran-
dum must be taken to mean *the*
vendor's 24 acres or those *so pointed*
out by him. *Byrne, J.*, had ex-
cluded this evidence because the
memorandum did not say so,
though he would have admitted
the evidence if the description
had been *the* 24 acres, &c. *Quære*,
whether in principle the judg-
ment of *Byrne, J.*, were not
sounder than those delivered in
the Court of Appeal, where the
Lords Justices appear to have
adopted as the rule of law, not
the decision in *Ogilvie v. Foljambe*

The memorandum required by the Statute of Frauds need not be contained in one document; it may be made out from several documents; if they can be connected together. It was formerly laid down that, in order to connect two documents together so as to establish a sufficient memorandum to satisfy the Statute of Frauds, one must contain some reference to the other (*c*). But later cases have established a wider rule, which appears to be this:—You are entitled to explain by parol evidence the meaning of any general expression used in any document (*d*). If therefore you have a document, signed by a party to be charged, which refers to an agreement made by him, but in such terms that the description of the agreement is obviously incomplete, you are entitled to give evidence to show what that agreement is, and if the evidence so adduced comprise another document containing all the terms of the agreement, or the terms not specified in the first document, the two documents may be read together as a memorandum sufficient to satisfy the Statute, although

Memorandum may be made out by several documents.

Rule as to connecting documents.

(3 Mer. 53), that “Mr. Ogilvie’s house” was a description sufficiently certain to allow of its being elucidated by parol evidence, but the *dictum* of Grant, M. R., that “the subject-matter of the agreement is left indeed to be ascertained by parol evidence, and for that purpose, such evidence may be received”; see 1897, 2 Ch. 287, 289. This *dictum* was of course uttered purely with reference to ascertaining what house answered to the description of Mr. Ogilvie’s house. But, surely, apart from this, it is not the law that a written memorandum of a contract is sufficient to satisfy the Statute of Frauds, although the subject-matter of the agreement is left to be ascertained by parol evidence; see cases cited above, pp. 4, n. *j*’, 5, n. *o*’. It is respectfully submitted that

the actual decision of the Court of Appeal may be supported on the ground that a sale of 24 acres of land at Totmonslow would be a valid sale of 24 acres of land to be selected by the purchaser out of the vendor’s land there; Shepp. Touch. 251; *Tapley v. Eagleton*, 12 Ch. D. 683; and that being so, it was competent to the vendor to prove that the purchaser had made his selection before the memorandum of the contract was signed; see *Wylson v. Dunn*, 34 Ch. D. 569.

(*c*) *Ridgway v. Wharton*, 3 D. M. & G. 677, 693-7, per Cranworth, C., who changed his mind, *S. C.*, 6 H. L. C. 238, 256; dissenting judgment of Williams, J., *N. Staffordshire Ry. v. Peck*, E. B. & E. 986, 1000-3.

(*d*) *Bainbridge v. Wade*, 16 Q. B. 89.

the evidence connecting them be parol evidence only (*e*). But if a signed document contain a reference to an agreement made by the signer in such terms that a complete agreement is described, and no explanation of the terms of the document is required on the face of it, the party seeking to charge the signer is not entitled to give parol evidence that the agreement is other than is described, although the signer may prove by parol evidence that the agreement described in the writing does not contain some term of the agreement into which he entered, and so avoid the contract under the Statute of Frauds (*f*). To give examples:—Parol evidence has been admitted to connect a signed letter referring to an agreement to purchase land with another document giving the terms of purchase (*g*); to connect a letter promising to “grant the extension of lease you solicit” with another letter showing the day on which the term granted by the lease was to expire (*h*); to show that the “instructions” to a solicitor referred to in a letter were a written memorandum containing fully the terms of the agreement sought to be enforced (*i*); to connect a letter containing a promise to grant a lease for fourteen years “at the rent and terms agreed upon” with another document in which such rent and terms were specified (*k*); and to show that the purchase referred to in a signed receipt for 31*l.* “as a deposit of the purchase” of certain land was an agreement for purchase of which

(*e*) *Ridgway v. Wharton*, 6 H. L. R. 3 Ch. 508; *Baumann v. James*, 4 C. P. D. 450; *Shardlow v. Cotterill*, 20 Ch. D. 90; *Studds v. Watson*, 28 Ch. D. 305; *Wylson v. Dunn*, 34 Ch. D. 569, 574, 575; *Oliver v. Hunting*, 44 Ch. D. 205; *Sheers v. Thimbleby*, 13 Times L. R. 451.

(*f*) *Hinde v. Whitehouse*, 7 East, 558, 569, 570; *Keworth v. Schofield*, 2 B. & C. 945; *Peirce v. Corf*,

L. R. 9 Q. B. 210; *Rishton v. Whatmore*, 8 Ch. D. 467.

(*g*) *Western v. Russell*, 3 V. & B. 187. See also *Cave v. Hastings*, 7 Q. B. D. 125 (reference to “our arrangement for the hire of your carriage”).

(*h*) *Verlander v. Codd*, T. & R. 352.

(*i*) *Ridgway v. Wharton*, 6 H. L. C. 238.

(*k*) *Baumann v. James*, L. R. 3 Ch. 508.

the terms were contained in a memorandum signed by the purchaser (*l*). So if one write a letter saying, "I accept your offer," there is no doubt that this may be shown by parol evidence to refer to another letter previously received, in which the terms of the offer are fully stated, so that a complete contract in writing may be established by the two letters read together (*m*). Similarly, parol evidence has been admitted to connect a letter addressed "Dear Sir" only with the envelope in which it was enclosed, and on which the purchaser's name was written (*n*). On the other hand, memoranda of sales written in auctioneers' books in terms, which needed no explanation, have been held insufficient to satisfy the Statute, on the ground that they contained no reference to special conditions on which the sales were made (*o*).

The signing contemplated by the Statute appears to be writing the name (*p*) of the party to be charged or The signature required.

(*l*) *Long v. Millar*, 4 C. P. D. 450; see also *Studds v. Watson*, 28 Ch. D. 305; *Oliver v. Hunting*, 44 Ch. D. 205; in which cases writings referring to "the purchase-money" were allowed to be explained by parol evidence and so connected with other documents containing the remaining terms of the purchase.

(*m*) *Bramwell, L. J., Long v. Millar*, 4 C. P. D. 450, 454; *Field, J., Cave v. Hastings*, 7 Q. B. D. 125, 128; *Kekewich, J., Oliver v. Hunting*, 44 Ch. D. 205, 209.

(*n*) *Pearce v. Gardner*, 1897, 1 Q. B. 688.

(*o*) *Hinde v. Whitehouse*, 7 East, 556, 569, 570; *Kenworthy v. Schofield*, 2 B. & C. 945; *Peirce v. Corf*, L. R. 9 Q. B. 210; *Rish-ton v. Whatnoye*, 8 Ch. D. 467.

(*p*) The party's usual signature, with initials for the Christian names, will do; *R. v. Arvey*, 18 Q. B. 576. Writing the ini-

tials only of the Christian name and surname, or even making a mark, appears to be a sufficient signature, if the signer be otherwise sufficiently described in the memorandum; *Selby v. Selby*, 3 Mer. 2; *Hubert v. Moreau*, 12 B. Moore, 216, 219. And it seems that signature by initials only may be enough without any other description of the signer, parol evidence being admissible to identify him; *Chichester v. Cobb*, 14 L. T. N. S. 433; cf. *Sweet v. Lee*, 3 Man. & Gr. 452, 460. But signature by mark alone without name or description is open to the objection that the memorandum is incomplete in not showing the party to be charged; *Hubert v. Moreau*, 2 C. & P. 528. A description, which may be sufficient to identify the person described as a party to the agreement (see ante, p. 5), may not be sufficient to constitute his signature of the memorandum; *Selby v. Selby*, 3 Mer. 2.

his authorized agent (*q*), so as to authenticate the memorandum (*r*). And as the Statute requires signing only and not subscribing, it does not much matter in what part of the document the signature is placed, provided the name be inserted in such a manner as to govern the whole memorandum (*s*). Thus in the case of memoranda drawn up in the third person, the mention of the names of the parties at the beginning has frequently been held to be a sufficient signature (*t*). So writing a person's name at the head of a memorandum of an agreement, to which he is a party, has been held to be a sufficient signature (*u*). But where a name inserted in the body of a memorandum relates only to particular sentences, it cannot be regarded as a signature of the whole document (*x*). And writing the names of the parties in a memorandum of agreement (even so as to govern the whole) will not be considered to be signing, if the terms of the instrument show that the parties intended it to be authenticated by further signature (*y*). If, however, the terms of a memorandum, in which the parties' names are inserted, leave a doubt, whether further signature was intended, parol evidence is admissible to show that either party made, authorized or adopted such signing of his name as his signature (*z*).

(*q*) *Phillimore v. Barry*, 1 Camp. 513; *White v. Proctor*, 4 Taunt. 209.

(*r*) *Stokes v. Moore*, 1 Cox, 219.

(*s*) *Ogilvie v. Foljambe*, 3 Mer. 53; *Lobb v. Stanley*, 5 Q. B. 574; *Caton v. Caton*, L. R. 2 H. L. 127, 143.

(*t*) See cases cited in preceding note; and *Propert v. Parker*, 1 Russ. & My. 625; *Blackley v. Smith*, 11 Sim. 150.

(*u*) *Schneider v. Norris*, 2 M. & S. 286; *Evans v. Hoare*, 1892, 1 Q. B. 593, where note that the letter was written by the defendants' clerk by their authority,

and then presented to the plaintiff for signature; so as that the defendants' name was actually written by their authorized agent; *Sims v. Landray*, 1894, 3 Ch. 318.

(*x*) *Stokes v. Moore*, 1 Cox, 219; *Caton v. Caton*, L. R. 2 H. L. 127.

(*y*) *Hubert v. Treherne*, 3 Man. & Gr. 743; *S. C.*, *nom. Hubert v. Turner*, 4 Scott, N. R. 486.

(*z*) *Johnson v. Dodgson*, 2 M. & W. 653; see also *Schneider v. Norris* and *Evans v. Hoare*, *ubi sup.*, which were decided upon this principle; *Hucklesby v. Hook*, 82 L. T. 117.

The memorandum mentioned in the 4th section of the Statute of Frauds is required to be signed by the party to be charged, or his agent. It is settled that the other party need not sign the memorandum, in order to enforce the agreement; it is sufficient that he be ready and willing to perform his part of the contract (*a*). An agent authorized to sign a memorandum of contract for his principal need not, it is held, be thereunto authorized in writing (*b*). And the memorandum may well be made or signed at any time after the contract has been entered into, but before an action is brought to enforce it (*c*). Agreements made without complying with the requirements of the Statute are held to be, not void, but only not enforceable (*d*).

Signature of party to be charged, or his agent, sufficient.

Memorandum subsequent to the contract.

An oral agreement for the sale of land may be enforced in certain exceptional cases, although the requirements of the Statute of Frauds have not been complied with. These are, first, where the sale is made by the Court, when the judicial character of the proceedings is held to preclude the danger of the mischief, which the Statute was intended to prevent (*e*). Secondly, according to the present practice, the defence of non-compliance with the requirements of the Statute of Frauds must be specially pleaded in an action upon a contract (*f*). So that if one sued in respect of an oral agreement for the sale of land omit to plead the defence of the Statute, the agreement may be established either by the admission of its existence in the defendant's pleading (*g*), or if not

Cases where agreement enforceable without compliance with Statute of Frauds.

1. Sale by Court.
2. Where defence of Statute not taken.

(*a*) *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Reuss v. Pickersley*, L. R. 1 Ex. 342.

(*b*) *Waller v. Hendon*, 5 Vin. Abr. 524, pl. 45; Sug. V. & P. 145; *Sims v. Landray*, 1894, 2 Ch. 318.

(*c*) *Re Holland*, 1902, 2 Ch. 360.

(*d*) *Leroux v. Brown*, 12 C. B. 801; *Maddison v. Alderson*, 8 App. Cas. 467, 474, 488.

(*e*) *A.-G. v. Day*, 1 Ves. sen. 218, 221; Sug. V. & P. 109; Dart, V. & P. 197, 1201, 5th ed.; 227, 1329-30, 6th ed.; 218, 1168, 7th ed.; Fry, Sp. Perfee, § 562.

(*f*) R. S. C., Order 19, r. 15; *Clarke v. Callow*, 46 L. J. N. S. Q. B. 53; see *Orham v. Brunning*, 12 Times L. R. 303, reversed 13 Times L. R. 65.

(*g*) See R. S. C., Order 19, rr. 13-20.

3. Fraud.

so admitted by oral evidence (*h*). And the Courts will now enforce an agreement so established, whether the relief claimed be the specific performance of the contract or damages for its breach (*i*). Thirdly, an agreement may be established by oral evidence, notwithstanding the terms of the Statute of Frauds, where it would be a fraud to repel proof of the agreement under cover of the Statute (*k*). Thus if an absolute conveyance of land be obtained under an oral agreement for a mortgage, the mortgagee will not be allowed to set up the Statute of Frauds as a defence to an action to enforce the right of redemption (*l*). So if one be induced to sign a written contract for the sale or purchase of land on the faith of some variation being made in the terms of the written agreement or of the performance of some collateral stipulation, oral evidence of the variation or stipulation so agreed upon will not be excluded by reason of the Statute (*m*). So where it is arranged that an agreement made orally shall be put into writing, but this is prevented by the fraud of one of the parties, he will not be allowed to avail himself of the defence of the Statute (*n*). Fourthly, if an oral contract for the

4. Part performance.

(*h*) *Olley v. Fisher*, 34 Ch. D. 367; *James v. Smith*, 1891, 1 Ch. 384.

(*i*) Under the old Chancery practice, an oral agreement would be specifically enforced, if it were admitted by the defendant's answer, and he did not insist on the Statute; *Limondson v. Sweed*, Gilb. 35; *Gunter v. Halsey*, Amb. 586; *Ridgway v. Wharton*, 3 De G. M. & G. 677, 689-692. But at common law, it was not necessary or proper to plead the Statute specially. If the defendant pleaded the general issue (that is, a general denial of the contract), the plaintiff had to establish a contract enforceable at law; and if he failed to prove compliance with the Statute of Frauds, the defendant might then raise the defence of the Statute; see *Butte-*

mere v. Hayes, 5 M. & W. 456, 460; *Leaf v. Tuton*, 10 M. & W. 393. And see *Futcher v. Futcher*, 45 L. T. N. S. 306.

(*k*) *Eldon, C., Mestaer v. Gillespie*, 11 Ves. 627-8; *Haigh v. Kaye*, L. R. 7 Ch. 469, 474; *Rochevoucauld v. Boustead*, 1897, 1 Ch. 196, 206.

(*l*) 1 Eq. Ca. Abr. 20, pl. 5; *Walker v. Walker*, 2 Atk. 98; *England v. Codrington*, 1 Eden, 169; *Lincoln v. Wright*, 4 De G. & J. 16, 22; *Douglas v. Culverwell*, 3 Giff. 251; 4 De G. F. & J. 20.

(*m*) See *Pember v. Mathers*, 1 Bro. C. C. 52; *Clarke v. Grant*, 14 Ves. 519; *Jervis v. Berridge*, L. R. 8 Ch. 351; Fry, Sp. Perfce. §§ 568, 809.

(*n*) *Maxwell v. Montacute*, Prec. Ch. 526. But unless there be

sale of land be partly performed by one of the parties thereto, that may preclude the other from setting up the defence of the Statute of Frauds to an action under the equitable jurisdiction of the Courts for the specific enforcement of the contract (*o*). For it is held in equity that when there has been part performance of an oral contract for the sale of land (which, as we have seen, is not void (*p*)), the parties are to be charged not so much upon the contract (*q*) as upon the equities arising from the acts of performance. The case is considered to have gone beyond the stage of mere contract and therefore to be outside the mischief aimed at by the Statute; and in order to do justice between the parties, oral evidence of the contract is admitted (*r*). But to have this effect, the acts of part performance must, according to the authoritative phrase, be "unequivocally and in their own nature referable to some such agreement as that alleged" (*s*). That is to say, the acts must be such that the existence of an agreement such as alleged is the only reasonable inference therefrom; they must be not only consistent with the contract asserted but referable to no other title (*t*). The acts moreover must be such as would render it a fraud to raise the defence of want of signed writing (*u*). The terms of the agreement, of

fraud, an oral agreement to put in writing and sign the terms of a contract regulated by the 4th section of the Statute of Frauds cannot be enforced; *Wood v. Midgley*, 5 De G. M. & G. 41, 45; see Fry, Sp. Perce. § 575, p. 267, 3rd ed.; p. 254, 4th ed.; *Johnston v. Boyes*, 42 Sol. J. 610; S. C., on further proceedings, 1899, 2 Ch. 73.

(*o*) See Selborne, C., *Maddison v. Alderson*, 8 App. Cas. 467, 474 et seq. A party sued for damages on an oral contract under the common law jurisdiction of the Courts is not precluded from raising the defence of the Statute

on account of part performance of the contract; *Lavery v. Pursell*, 39 Ch. D. 508, 518.

(*p*) Above, p. 11.

(*q*) See the words of the Statute; above, p. 3.

(*r*) See *Maddison v. Alderson*, 8 App. Cas. 475-8.

(*s*) *Maddison v. Alderson*, 8 App. Cas. 479.

(*t*) See *Wills v. Stradling*, 3 Ves. jun. 378, 381; *Morphet v. Jones*, 1 Sw. 172, 181.

(*u*) *Buckmaster v. Harrop*, 7 Ves. 341, 345; *Redesdale, Ir. C., Clinan v. Cooke*, 1 Sch. & Lef. 22, 41; *Mundy v. Joliffe*, 5 My. & Cr. 167, 177.

which the existence is so inferred, must be duly proved by oral evidence (*x*). And the agreement so proved must be a contract enforceable (in all respects save the absence of signed writing) under the equitable as distinguished from the common law jurisdiction of the Courts (*y*). To give examples, taking possession of land under an oral agreement for the purchase or lease of it is the strongest case of an act of part performance raising the equity in question. For "the acknowledged possession of a stranger in the land of another is not explicable save on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract" (*z*). But mere holding over by a tenant whose term has expired is not unequivocally referable to a new contract with his landlord (*a*). So payment of part and possibly the whole of the purchase-money is not sufficient to let in oral evidence of a contract for the sale of land; for "the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land" (*b*).

Offer and
acceptance.

In regard to the expression of the parties' consent, the formation of a contract for the sale of land is governed by the general law of contract, subject of course to the requisite of form (*c*) (namely, signed writing), which has just been considered. Thus in order that the acceptance of an offer (*d*) may make a contract, it is essential that there should be *communication* of the offer and its

Communica-
tion.

(*x*) *Cooth v. Jackson*, 6 Ves. 12, 38; *Thynne v. Glengall*, 2 H. L. C. 131, 158; *Maddison v. Alderson*, 8 App. Cas. 467.

(*y*) *Britain v. Rossiter*, 11 Q. B. D. 123; *McManus v. Cooke*, 35 Ch. D. 681; *Lavery v. Pursell*, 39 Ch. D. 508, 518; Fry, Sp. Perce. §§ 592-598.

(*z*) *Plumer, M. R., Morphet v. Jones*, 1 Sw. 181; and see

Jessel, M. R., *Ungley v. Ungley*, 5 Ch. D. 887, 890; *Dickinson v. Barrow*, 1904, 2 Ch. 339, 344.

(*a*) *Wills v. Stradling*, 3 Ves. jun. 381; *Maddison v. Alderson*, 8 App. Cas. 480.

(*b*) *Maddison v. Alderson*, 8 App. Cas. 478-9.

(*c*) Above, p. 3.

(*d*) See above, p. 3.

acceptance to each party respectively (*e*), and the acceptance must be absolute and identical with the terms of the offer (*f*). If therefore you offer to sell me your land, though I make up my mind to accept, there is no contract between us until I duly signify to you my acceptance. And this will be the case, even though you state in your offer that, unless you hear from me, you will consider the matter as concluded; for though you may indicate to me the manner in which my acceptance shall be signified, you are not at liberty to stipulate that my acceptance shall be implied, if I do nothing (*g*). Again if I offer to sell you my land for 1,000*l.*, an answer that you will give 950*l.* for it is no acceptance of my offer, but a counter-proposal on your part; it is a rejection of my offer; and if I should decline your proposal, you would not be at liberty to bind me by accepting my terms, unless I had renewed my offer to you (*h*). An offer may be revoked (*i*) at any time before its acceptance be duly communicated to the proposer: but, as in the case of acceptance, mere change of mind is not enough to revoke an offer; the change must be communicated to the other party (*k*). When the acceptance of an offer is duly communicated to the proposer, the contract is completely formed, and neither party is at liberty to recede (*l*). Here we may notice that, where the parties are in communication through

Revocation.

Communication through the post.

(*c*) *Felthouse v. Bindley*, 11 C. B. N. S. 869; *Dickinson v. Dodds*, 2 Ch. D. 463; *Brayden v. Metropolitan Ry. Co.*, 2 App. Cas. 666, 691-2.

(*f*) *Hyde v. Wrench*, 3 Beav. 334; and see *Felthouse v. Bindley*, ubi sup.; *Bonnevill v. Jenkins*, 8 Ch. D. 70.

(*g*) See cases cited in last note but one.

(*h*) *Hyde v. Wrench*, 3 Beav. 334.

(*i*) Or varied, variation being a revocation and new offer; *Honey-*

man v. Marryat, 21 Beav. 14, 20, affd. 6 H. L. C. 112.

(*k*) *Byrne v. Van Tienhoven*, 5 C. P. D. 344, 347; *Henthorn v. Fraser*, 1892, 2 Ch. 27, 31, 32, 36. It appears, however, that an offer may be effectually revoked, if the proposer have distinctly signified his change of mind and this come to the knowledge of the other party, though the proposer did not make the communication; *Dickinson v. Dodds*, 2 Ch. D. 463.

(*l*) *Adams v. Lindsell*, 1 B. & A. 681; *Byrne v. Van Tienhoven*, *Henthorn v. Fraser*, ubi sup.

the post, or where the post is the natural channel for sending the answer to a proposal of contract, acceptance of the offer is held to be duly signified when a letter of acceptance is *posted* (*m*). So that the proposer is bound, notwithstanding that the letter be delayed in the post beyond the time when he naturally expected to receive it (*n*), and even though the letter be lost in the post and he never received it (*o*); and he cannot withdraw his offer after a letter accepting it has been posted to him (*p*). This is a rule of convenience, and its best explanation seems to be that a proposer making an offer, to which he might naturally expect the answer to be sent by post, must be taken, if not to have authorized that mode of communication, at least to have accepted its usual conditions and risks. Posting a letter of acceptance of such an offer is therefore considered as a compliance with the conditions of the offer as regards the signification of acceptance (*q*). It follows that the acceptor ought not to be prejudiced by anything which may occur after his letter has been posted. Thus it would be unjust, and it would be impossible to carry on business through the post, if the proposer were allowed to withdraw in the interval between the posting of the acceptance and its arrival. So delay or loss of a letter in the post is no fault of the sender, who parts with all control over it when it is posted; and he ought not to suffer therefrom (*r*). This doctrine, it should be stated, has no application in the case of the revocation of an offer; which, if communicated by post, only takes effect

(*m*) See *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; *Henthorn v. Fraser*, 1892, 2 Ch. 27; *Re London and Northern Bank*, 1900, 1 Ch. 220.

(*n*) *Dunlop v. Higgins*, 1 H. L. C. 381.

(*o*) *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216, *diss.* Bramwell, L. J.

(*p*) *Re Imperial Land Co. of Marseilles, Harris's Case*, L. R. 7 Ch. 587; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Henthorn v. Fraser*, 1892, 2 Ch. 27.

(*q*) See *Henthorn v. Fraser*, 1892, 2 Ch. 27.

(*r*) See the cases cited in the five preceding notes.

when the letter actually reaches the person to whom it is addressed; for the revocation of an offer is not a matter which its recipient can be expected to contemplate, and his acceptance of the exigencies of postal communication cannot be inferred (*s*). In order to bind the proposer, an offer must in general be accepted within a reasonable time after it is made (*t*). What is a reasonable time is of course a question of fact in each particular case (*u*). Here it may be noticed that a promise to keep an offer open for a particular time is unenforceable for want of consideration (*x*); so that an offer accompanied by such a promise may be withdrawn, provided it has not been accepted, before the time specified has elapsed (*y*). Time for acceptance.

Owing to the above-mentioned provisions of the Statute of Frauds, the object of all negotiations as to the sale of land is to arrive at an agreement, not merely expressed orally, but put into writing and signed (*z*). And it is usually desired, on the vendor's part at least, not to enter into an open contract (that is, a contract simply ascertaining the parties, the property to be sold and the price and leaving the other terms to be implied by law), but to modify by express stipulation the legal incidents of the bargain. For as we shall see, the law imposes on every vendor of land the duty of strictly proving his title; and it is not often advisable that he should undertake his full legal liabilities in this respect (*a*). Thus a formal contract for the sale of land Negotiation of a contract for sale.

(*s*) See the cases cited in note (*p*) to p. 16, above; also *Curtice v. London, City and Midland Bank, Ltd.*, 1908, 1 K. B. 293.

(*t*) *Rummen v. Robins*, 3 De G. J. & S. 88; *Ramsgate Victoria Hotel Co. v. Montefiore*, L. R. 1 Ex. 109.

(*u*). See *Dunlop v. Haggens*, 1 H. L. C. 351.

(*x*) *Cooke v. Oxley*, 3 T. R. 653.

If the promise be made by deed or for valuable consideration, it is of course enforceable.

(*y*) *Routledge v. Grant*, 4 Bing. 653; *Dickinson v. Dodds*, 2 Ch. D. 463; *Henthorn v. Fraser*, 1892, 2 Ch. 27.

(*z*) See above, pp. 3, 4.

(*a*) It is frequently desirable that a vendor should limit by express stipulation the time for

Open contract.

Answering
proposals
as to sale.

generally contains special stipulations of a technical character. It is therefore very necessary for those who negotiate the sale of land to understand the principles of the formation of contract. The main thing to remember is that unconditional acceptance of an offer makes a contract, to which no new term can be added, and from which neither party can recede, except by the consent of both: whilst any acceptance, which is conditional on the variation of some term of the offer, is really a new proposal, and must in its turn be accepted by the other party before a contract is formed (*b*). Any one, who receives an offer of sale or purchase, to which he is favourably inclined, should make up his mind before answering whether he wishes to conclude an immediate contract or merely to signify his assent that the terms proposed shall form the basis of a future contract. In the former case he should accept unconditionally and in the simplest words; for instance, "I accept the offer contained in your letter of such a date." In the latter event he should be very careful to express plainly his intention to give a provisional assent only and not to be bound until all the terms of a future agreement have been settled. The best way to do this is to state clearly that the intended contract may contain other terms than those provisionally accepted; to say, for example, "I am willing that the terms of purchase proposed in your letter dated, &c. shall form the basis of a future contract between us to be approved by my solicitor and to contain such stipulations as he may advise me to insert therein" (*c*). For if an offer be

which he is to show title: and it is always advisable that he should reserve to himself the power of rescinding the contract if the purchaser should insist on any requisition as to title which he is unable or unwilling to comply with.

(*b*) See the cases cited above,

p. 15; and *Chimock v. Marchioness of Ely*, 4 De G. J. & S. 638; *Crossley v. Maycock*, L. R. 18 Eq. 180.

(*c*) See *Winn v. Bull*, 7 Ch. D. 29, where an agreement as to terms of lease, "subject to the preparation and approval of a formal contract," was held not to

accepted with the suggestion that a formal contract shall be prepared but without expressing any intention that the terms proposed shall or may be varied thereby, the acceptance is practically unconditional and the contract is formed at once (*d*). Here we may notice that, when it is sought to establish a contract by letters which have passed between different parties, the Court will take into consideration the whole of the correspondence which has passed, and will not draw the line at any particular letter or letters, which might have afforded evidence of a contract, if considered apart from the rest (*e*). Where an agreement for the sale of land is made by word of mouth, an enforceable contract is of course not made until a proper memorandum of the agreement be written out and signed by one of the parties (*f*). But an offer in writing specifying all the terms of a proposed agreement and signed by the proposer may be accepted orally, and will then be a sufficient memorandum of the contract to bind him under the Statute of Frauds (*g*).

The whole of the correspondence will be looked at.

Oral agreement.

Oral acceptance of written offer.

constitute a contract, the reference to the approval of the formal contract being considered to imply contemplation of the possibility of introducing new terms; *Hawkesworth v. Chaffey*, 55 L. J. Ch. 335. As to the effect of a stipulation for the approval of one's solicitor, see *Bartlett v. Greene*, 30 L. T. N. S. 553; *Hudson v. Buck*, 7 Ch. D. 683; *Hussey v. Horne Payne*, 8 Ch. D. 670, 4 App. Cas. 311, 322; *Cluck v. Wood*, 9 Q. B. D. 276.

(*d*) See *Fowler v. Freeman*, 9 Ves. 351; *Lewis v. Brass*, 3 Q. B. D. 667; *Bonnewell v. Jenkins*, 8 Ch. D. 70; *Rossiter v. Miller*, 3 App. Cas. 1124; *Hucklesby v. Hook*, 82 L. T. 117. When an offer is accepted in writing with a reference to the preparation of a formal contract, it is of course a question of the construction of the particular document, whether

the acceptance is unconditional or not. If not, it is merely a counter-proposal and no contract is made. See the cases cited in this and the two preceding notes, and *Valle of North Colliery Co. v. Furness*, 45 L. J. N. S. Ch. 276; *Harvey v. Barnard's Inn*, 50 L. J. N. S. Ch. 750; *North v. Percival*, 1898, 2 Ch. 128 (*quære* if rightly decided: *Winn v. Bull*, 7 Ch. D. 29, was not cited).

(*e*) *Hussey v. Horne Payne*, 4 App. Cas. 311, 316; *Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs*, 44 Ch. D. 616, a case in which, after there had been unqualified acceptance of an offer, the parties continued to negotiate about other terms of their agreement.

(*f*) See above, pp. 3, 12, n. (iii).

(*g*) *Reuss v. Picksley*, L. R. 1 Ex. 342; *Lever v. Koffler*, 1901, 1 Ch. 543.

Sale by
auction.

With regard to the formation of the contract on the sale of land by auction, a bidding at an auction is no more than an offer, and no contract is created until that offer is accepted by the auctioneer, as the vendor's agent; acceptance being signified by the fall of the auctioneer's hammer. As an offer is revocable before acceptance, a person bidding at a sale by auction may audibly retract his bidding at any time before the fall of the hammer (*h*). For this reason a stipulation that no bidding shall be retracted is almost invariably made. It seems however that such a condition cannot be enforced (*i*). For, as Lord St. Leonards pointed out (*k*), to hold that an action would lie on an implied undertaking not to retract a bidding would be an invasion of the before-mentioned provision of the Statute of Frauds (*l*), whereby no action shall be brought to charge any person upon any contract or sale of lands, unless the agreement be in writing and signed by him or his agent. And sales by auction are within the Statute (*m*). On a sale by auction the auctioneer is held to be the agent both of the vendor and the purchaser for the purpose of signing a memorandum of the contract. This authority is given by the vendor by his appointment of the auctioneer to conduct the sale. In the case of the purchaser, the agency is conferred by the acceptance of his bidding, which is considered to imply an offer of such authority (*n*). The vendor may

Auctioneer
agent to sign.

(*h*) *Payne v. Cave*, 3 T. R. 148.

(*i*) Such a condition made on a sale by the Court has been held to bind the solicitor of a mortgagee, who consented to the sale but was not a party to the suit; *Freer v. Rimmer*, 14 Sim. 391.

(*k*) Sug. V. & P. 14; 1 Dart, V. & P. 124, 5th ed.; 139, 6th ed.; 136, 7th ed.

(*l*) Above, p. 3.

(*m*) *Blagden v. Bradbear*, 12 Ves. 466.

(*n*) *Emmerson v. Heelis*, 2 Taunt.

38; *White v. Proctor*, 4 Taunt. 209; *Kemeys v. Proctor*, 1 J. & W. 350; Sug. V. & P. 42, 43, 147; Fry, Sp. Perce. § 529; the auctioneer cannot delegate his authority in this respect. For vendor or purchaser to be bound by the signature of the auctioneer's clerk, he must have authorized the clerk to sign for him. It seems that such authority may be implied on the part of the vendor from his appointment of the auctioneer, the usual course

Auctioneer's
clerk.

of course revoke the authority given to the auctioneer at any time before the bidding is accepted (*o*). There is no doubt that if property be knocked down to any one at an auction and the auctioneer sign a memorandum of the contract directly after the sale, neither vendor nor purchaser can then withdraw his authority from the auctioneer (*p*). But the authority impliedly given by the purchaser to the auctioneer is an authority to sign *immediately* after the sale; and if this be not done, the authority will cease (*q*). And it has been held that after the fall of the hammer neither party can revoke the auctioneer's authority to sign for him; so that a memorandum signed by the auctioneer immediately after the sale will bind both parties, notwithstanding that one of them expressly forbade the auctioneer, after the fall of the hammer, to sign on his behalf (*r*). If

of business being for the clerk to take down the names. But it has been held that no similar authority can be implied on the part of the purchaser from his bidding: *Bell v. Balls*, 1897, 1 Ch. 663. If, however, either party assent in any way to the clerk's signature on his behalf, he is bound. See *Bird v. Boulter*, 4 B. & Ad. 443; *Peirce v. Corf*, L. R. 9 Q. B. 210; *Dyas v. Stafford*, 7 L. R. Ir. 590, 602; Sug. V. & P. 146; Fry, Sp. Perfece. § 531; *Simms v. Landray*, 1894, 2 Ch. 318, where the purchaser stood by while the auctioneer's clerk inserted his name in the memorandum.

(*o*) See *Warlow v. Harrison*, 1 E. & E. 295, 309; *Johnston v. Boyes*, 1899, 2 Ch. 73.

(*p*) See the cases cited at the beginning of the last note but one.

(*q*) *Bell v. Balls*, 1897, 1 Ch. 663.

(*r*) *Van Praagh v. Everidge*, 1902, 2 Ch. 266, 270, reversed on other grounds, 1903, 1 Ch. 431. The proposition in the text is also countenanced by the fact that in *Mason v. Armitage*, 13 Ves. 25,

37, a memorandum signed by an auctioneer was considered to bind the vendor at law, though he swore in his answer that he had revoked the auctioneer's authority before such signature; and by the fact that in *Day v. Wells*, 30 Beav. 220 (approved by Stirling, J., *Bell v. Balls*, 1897, 1 Ch. 672), an argument against specific performance, that the vendor so revoked the auctioneer's authority, was held to call for no reply; and by the statements in 1 Dart, V. & P. 182, 5th ed.; 209, 6th ed.; 208, 7th ed.; Fry, Sp. Perfece. § 530. In *Mason v. Armitage* and *Day v. Wells*, however, the actual decision was that, if there were a contract enforceable at law, specific performance thereof would not be enforced in equity on account of circumstances of mistake. And it is said that if one authorize another to sell his land privately, and the agent make an oral contract for sale, the principal may withdraw his authority at any time before the agent signs a written contract on his behalf; *Farmer v. Robinson*, 2 Camp. 339, n.; Sug. V. & P. 146. If in the

however after a sale by auction the vendor or the purchaser refuse to sign a memorandum of the contract and the auctioneer will not sign for him, it is difficult to see what remedy the other party has to enforce his bargain. For, as we have seen, apart from fraud, an agreement to put into writing and sign a contract for sale of land cannot be enforced (*s*). And in the absence of a signed memorandum no action lies to charge any person upon the contract for sale (*t*).

Employment
of a puffer
at an auction.

Under the present law, if a puffer, that is, a person engaged to bid on the vendor's behalf in order to prevent a sale at an undervalue or to force up the price, be employed without the vendor having expressly reserved to himself the right to bid, the sale will be invalid. At common law it was well settled that the employment of puffers or of a single puffer on the vendor's behalf rendered the sale void on the ground of fraud, where it had been announced that the sale would be without reserve or that the highest bidder should be the purchaser (*u*). In equity however there was authority to the effect that the employment of a single puffer, to prevent a sale at an undervalue, would not invalidate the sale, unless the property were expressly or impliedly offered for sale without reserve (*x*): though Lord

case of a private sale made orally by an agent, the policy of the Statute of Frauds is sufficiently strong to prevail over the general principle that agency cannot be revoked after the agent has so acted under his authority as to induce a third party to alter his legal position (as to which, see Story on Agency, §§ 466-8), it is difficult to see why a sale by auction should be governed by a different rule; especially when the publicity of an auction is expressly held to be no reason for excluding the operation of the

statute; *Blagden v. Bradbear*, 12 Ves. 466.

(*s*) Above, p. 12, n. (*n*).

(*t*) *Blagden v. Bradbear*, 12 Ves. 466; and see *Rainbow v. Hawkins*, 1904, 2 K. B. 322, 324.

(*u*) *Howard v. Castle*, 6 T. R. 642; *Thornett v. Haines*, 15 M. & W. 367; Sug. V. & P. 9, 10; *Green v. Baverstock*, 10 Jur. N.S. 47; *Mortimer v. Bell*, L. R. 1 Ch. 10.

(*x*) *Smith v. Clarke*, 12 Ves. 477; *Woodward v. Miller*, 2 Coll. 279; Sug. V. & P. 9, 10; 1 Dart, V. & P. 195, 5th ed.; 224, 6th ed.; 209, 7th ed.

Cranworth, in *Mortimer v. Bell* (*y*), doubted whether he would be bound to hold that the rule, which had been established at common law, did not hold good in equity. The law is now settled by the Sale of Land by Auction Act, 1867 (*z*), whereby it is enacted (*a*) that whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law. The Act also provides (*b*) that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; and if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person. And it is further enacted (*c*) that, where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any *one* person on his behalf to bid at such auction in such manner as he may think proper. It has been held, under this Act, that if it be stated that land will be sold by auction subject to a reserved price or bidding, without saying that a right to bid is reserved, it is not lawful to employ a puffer to bid up to the reserve price (*d*). And the opinion has been judicially expressed that the Act limits a vendor, who has reserved the right to bid, to the employment of one person only to bid on his behalf (*e*). The terms of a condition reserving the right to bid must of course be strictly

(*y*) L. R. 1 Ch. 10, 16.

(*z*) Stat. 30 & 31 Vict. c. 48.

(*a*) Sect. 4.

(*b*) Stat. 30 & 31 Vict. c. 48, s. 5.

(*c*) Sect. 6.

(*d*) *Gilliat v. Gilliat*, L. R. 9 Eq. 60.

(*e*) *Grove and Lindley, J.J., Parfitt v. Jepson*, 46 L. J. N. S. C. P. 529, 532, 533.

observed; as if the vendor reserve the right of bidding *once*, a second bidding on his behalf will invalidate the sale (*f*). In consequence of this law, when land is to be sold by auction, the conditions of sale usually provide that the vendor reserves the right to bid as often as he may please; and if the sale be stated to be subject to a reserved price, the right of bidding generally is reserved to the vendor as well (*g*).

Inadvertent acceptance of bidding lower than the reserve price.

Where land is sold by auction subject to a condition that there will be a reserve price, and the auctioneer inadvertently accepts a bid lower than the reserve price, he is at liberty to retract such acceptance and to decline to sign a memorandum of the sale, and will incur no liability in so doing; for the condition is in effect that the property will not be sold for less than the reserve price, and every bidder is bound by that stipulation (*h*). It appears that, if land be placed in the hands of an auctioneer to be sold, he has authority, in the absence of instructions to the contrary, to put up the property for sale without reserve (*i*), and that the vendor would be bound by a memorandum signed by the auctioneer on his behalf of a sale so made (*k*). But it seems that if an auctioneer instructed to put property up to auction subject to a reserve price should nevertheless advertise the sale to be without reserve and accept a bidding lower than the reserve price and sign a memorandum of such sale, the vendor would not be liable on the contract so made without his authority (*l*). It has

(*f*) *Parfitt v. Jepson*, 46 L. J. N. S. C. P. 529, 532, 533.

(*g*) 1 Davidson, *Prec. Conv.* 607, 4th ed.; 518, 5th ed.; Key & Elphinstone, *Prec. Conv.* 257, 258 and n. (*a*), 4th ed.; 245 and n. (*b*), 8th ed.

(*h*) *McManus v. Fortescue*, 1907, 2 K. B. 1.

(*i*) *Rainbow v. Hawkins*, 1904, 2 K. B. 322.

(*k*) Above, p. 21.

(*l*) See *McManus v. Fortescue*, 1907, 2 K. B. 1, 6, 7, apparently overruling the decision or *dicta* in *Rainbow v. Hawkins*, 1904, 2 K. B. 322, to the contrary. The general rule certainly is that a plaintiff suing a principal upon a contract made by his agent has the *onus* of proving that the principal did

been held that, where an auctioneer instructed to put up property to auction at a reserve price, inadvertently advertises (without disclosing who is his principal) that the sale will be held without reserve and accepts a bid lower than the reserve price, but declines to sign a memorandum of the contract or to carry out the sale, he is liable in damages to the bidder for breach either of a contract or of an implied warranty of authority that the sale shall be without reserve (*m*). But it has been decided that an auctioneer, who advertises that by the direction of his principal, whose identity he discloses, a sale will be held without reserve, does not himself become liable to any bidder at the auction upon a contract that the sale shall be without reserve (*n*). It has been considered that a vendor, who as principal issues an advertisement that a sale of land by auction will be held without reserve or under the condition that the highest bidder shall be the purchaser, is liable, if the sale be held and he then decline to sell to the highest bidder, upon an independent contract that the sale shall be carried out under the conditions advertised, and such contract is not required to be put in writing by the Statute of Frauds (*o*). But it has been held that, if it be advertised that a sale of property by auction will be held on a certain day and that the highest bidder shall be the purchaser, that does not amount to an offer capable of being turned by acceptance into a contract that the sale shall be held on the day specified or at all; and if on the day named the property be not put up for or be withdrawn from sale,

Liability of auctioneer advertising a sale without reserve.

Liability of the owner of property advertising a sale by auction without reserve.

Advertisement of a sale by auction is not an offer, open to become a contract on acceptance, that the sale shall take place.

in fact authorise the agent so to contract for him; see below, Chap. XIX. § 2, at end.

(*m*) *Warbur v. Harrison*, 1 E. & E. 295, 309. This was so decided on the theory of the advertisement being an offer open to all, which was turned into a contract by acceptance of the

bidding.

(*n*) *Mainprice v. Westley*, 6 B. & S. 420.

(*o*) *Johnston v. Rogers*, 1899, 2 Ch. 73, 77, following *Warbur v. Harrison*, above, n. (*m*); and see *Blackburn and Quain, J.J., Harris v. Nickerson*, L. R. 8 Q. B. 286, 288, 289.

a person, who had intended to bid for it, has no cause of action to recover damages for his disappointment or his expenses of attending in expectation of the sale (*p*). If an advertisement of a sale by auction be fraudulently made, any person who is thereby induced to incur useless expense or other detriment has a good cause of action against the advertiser (*q*).

Payment of
a deposit.

A matter to be considered before the formation of a contract is the payment of a deposit. For no deposit of any part of the purchase-money can be lawfully demanded after an open contract for sale has been concluded; as the whole price is not payable until the time for completion, which in the case of an open contract is the time when the vendor shall have shown a good title (*r*). On sales by auction a stipulation is invariably made that a deposit of a certain proportion (generally ten per cent.) of the purchase-money shall be paid by the purchaser immediately on entering into the contract. On London sales, it is usually provided that the deposit shall be paid into the hands of the auctioneers; on country sales, the vendor's solicitors are generally appointed to receive it (*s*). The deposit is taken not only in part payment of the purchase-money, but also as a guarantee for the due performance of the contract; and it is liable to be forfeited by the purchaser if he fail to carry out the agreement. This is the case, whether the stipulation for payment of the deposit expressly so provide, or not (*t*). When the deposit is paid to an

(*p*) *Harris v. Nickerson*, L. R. 8 Q. B. 286.

(*q*) *Mainprice v. Westley*, 6 B. & S. 420, 427; *Richardson v. Silvester*, L. R. 9 Q. B. 34.

(*r*) *Binks v. Rokeby*, 2 Swans. 222; *Doc d. Gray v. Stanion*, 1 M. & W. 695, 701; 2 Dart, V. & P.

630, 5th ed.; 711, 6th ed.; 623, 7th ed.

(*s*) 1 Davidson, *Proc. Conv.* 519 and n. (c), 5th ed.; 1 Key & Elphinstone, *Proc. Conv.* 258 and n. (b), 4th ed.; 246, n. (a), 8th ed.

(*t*) *Howe v. Smith*, 27 Ch. D. 89; *Sprague v. Booth*, 1909, A. C. 576, 579, 580.

auctioneer, he receives it as stakeholder, being liable to pay it to the vendor, should the contract be completed or the purchaser break the contract, but to the purchaser, should the contract be broken by the vendor (*u*). The auctioneer is responsible for the sum deposited with him; and as he receives the deposit in this character and with this responsibility, and not as agent for either party, he is entitled to retain for his own benefit any interest he may make by the use of the money, whilst it remains in his hands. Until the purchase is completed, the auctioneer ought not to part with the deposit without the consent of the purchaser as well as of the vendor (*x*). Where the deposit is paid to the vendor's solicitor, it is generally received by him as agent for the vendor. In that case he cannot put it out at interest without accounting therefor to the vendor; and if the vendor demand payment of the deposit to himself, the solicitor will be bound to hand it over to him (*y*). If however the vendor's solicitor receive the deposit in the character of stakeholder, and not as the vendor's agent, he will be subject to the same responsibilities and enjoy the same advantages as any other stakeholder (*z*).

Sometimes provision is made for payment of a deposit on sales by private contract. The insertion of such a condition is of great advantage to the vendor, owing to the rule that the deposit is a guarantee for the purchaser's performance of his agreement (*a*). To the purchaser, however, the payment of a deposit is correspondingly prejudicial; as it leaves him exposed to the danger of losing his deposit in a case where the

Payment of
deposit on
sales by
private
contract.

(*u*) *Harington v. Hoggart*, 1 B. & Ad. 577. See below, Chap. XIX. § 1.

(*x*) 1 Dart, V. & P. 178, 5th ed.; 205, 6th ed.; 203, 7th ed.

(*y*) *Edgell v. Day*, L. R. 1 C. P. 80.

(*z*) *Wiggins v. Lord*, 4 Beav. 30.

(*a*) Above, p. 26.

Court, while refusing to enforce specific performance against him, will yet hold him to his bargain at law (*b*). A purchaser by private treaty should therefore take care not to bind himself by a stipulation for payment of a deposit, if he can possibly avoid doing so. And if the vendor refuse to sell except on condition of the payment of a deposit, the purchaser should on no account agree to the payment of the deposit to the vendor, or to the vendor's solicitor as his agent, but should insist on placing the deposit in the hands of a stakeholder. If the vendor's solicitors be of good repute, they may usually be accepted as holders of the deposit, the contract expressly providing that the same is to be paid to them *as stakeholders*. For if a purchaser submit to pay a deposit to the vendor's solicitors as the vendor's agents, he may find that the vendor can make no title to the property sold and is insolvent; and in such a case the purchaser will have no right to sue the solicitors for the recovery of his deposit (*c*).

Stamp on
contract for
sale of lands.

All contracts for the sale of land, whether made by formal memorandum or by letter (*d*), must be duly stamped; otherwise they cannot be given in evidence, except in criminal proceedings, and are not available for any purpose whatever. But they may be stamped after execution, and so received in evidence on payment of the proper duty and the appointed penalty (*e*).

(*b*) *Scott v. Alvarez*, 1895, 2 Ch. 603. See below, Chap. VI.

(*c*) *Ellis v. Goulton*, 1893, 1 Q. B. 350.

(*d*) See *Gwythor v. Gordon*, 3 Times L. R. 461; *Carlill v. Carbolic Smoke Ball Co.*, 1892, 2 Q. B. 484, 489, 490, affirmed 1893, 1 Q. B. 256.

(*e*) Stat. 54 & 55 Vict. c. 39 (Stamp Act, 1891), ss. 14, 15, replacing 33 & 34 Vict. c. 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29. Under the Stamp Act, 1891, agreements under hand only are, as a rule, chargeable with the duty of sixpence, which may be denoted by an adhesive stamp to be cancelled by the person by whom the agreement is first executed; and agreements under seal are chargeable, as deeds, with the duty of ten shillings; sect. 22 & 1st schedule. But by sect. 59:—

(1) Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any

Any alterations made, after a written contract for the sale of land has been signed, in the terms of the

Alterations in the contract.

clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

(2) Where the purchaser has paid the said *ad valorem* duty and before having obtained a conveyance or transfer of the property enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require.

(3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.

(4) Provided that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof.

(5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the Commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the Commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this provision shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof.

(6) Provided also, that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the Commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

The provisions of sub-section 1 of the above enactment have been considered in *Smelting Co. of Australia, Ltd. v. Commrs. of Inland Revenue*, 1897, 1 Q. B. 175; *West London Syndicate, Ltd. v. Commrs. of Inland Revenue*, 1898, 2 Q. B. 507; *Farmer & Co., Ltd. v. Commrs. of Inland Revenue*, 1898, 2 Q. B. 141 (contract made in England for sale of equity of redemption of lands in New South Wales held chargeable with *ad valorem* duty); *Chesterfield Brewery Co. v. Inland*

agreement must also be put into writing and signed, or the contract will not be enforceable in its altered form (*f*); and such further writing must be stamped as a new agreement.

Revenue Commrs., 1899, 2 Q. B. 7; *Danubian Sugar Factories, Ltd. v. Inland Revenue Commrs.*, 1901, 1 Q. B. 245; *Inland Revenue Commrs. v. Muller, &c. Ltd.*, 1901, A. C. 217.

The practical result appears to be that contracts for sale of any legal estate or interest in any lands, tenements or hereditaments are only chargeable with the stamp duty of sixpence or ten shillings according as they are under hand or seal. While contracts for sale of any equitable estate or interest in any property whatsoever, including lands wherever situate, are chargeable with *ad valorem* duty, but may be stamped with the fixed duty of sixpence or ten shillings, if a further conveyance of the estate or interest sold be contemplated. To leave the last-mentioned contracts unstamped would appear to involve the risk of having to pay double the *ad valorem* duty on stamping after execution; see sect. 15 of the Stamp Act, 1891.

(*f*) See below, Chap. XVIII. § 1.

CHAPTER II.

OF THE PARTIES' RIGHTS, OBLIGATIONS AND
REMEDIES, GENERALLY.

HAVING considered the formation of a contract for the sale of land, let us pass on to examine its terms. As we have seen (*a*), such contracts generally contain special stipulations varying the rights and obligations of the parties as defined by law. And a conveyancer's business in connection with sales of land includes drawing up the conditions of a sale by auction, a task in which he is engaged exclusively in the vendor's interest; arranging the terms of a private contract, when he may be acting for either party, making requisitions on title for the purchaser or answering them on the vendor's behalf, and settling the conveyance on either side. It is obvious that these duties cannot be efficiently discharged without an accurate knowledge of the position of the parties to any open contract, and a clear understanding of the conditions generally made in more formal agreements. Our object therefore will be to ascertain the rights and obligations implied by law on a contract to sell land, when the parties, the property and the price are the only terms defined; and to consider at the same time the stipulations by which the contractors' legal relations are commonly modified. And our design is first to take a general view of the contract and the remedies for enforcing it, and then to

Convey-
ancers' duties
on sales.

(*a*) Above, p. 17.

examine more fully each incident of the sale in turn, as far as possible, in order of time according as each part of the contract has to be performed.

Outline of
the effect of
the contract.

When two persons have entered into the relation of vendor and purchaser by duly signing a contract for the sale of land, their chief duties are these:—The vendor is bound to show a good title to the property sold (*b*), and for that purpose to deliver at his own expense to the purchaser a proper abstract of title to the property,

(*b*) *Flureau v. Thornhill*, 2 W. Bl. 1078; *Souter v. Drake*, 5 B. & Ad. 992; *Doe d. Gray v. Stanion*, 1 M. & W. 695, 701; *Lysaght v. Edwards*, 2 Ch. D. 499, 507; *Ellis v. Rogers*, 29 Ch. D. 661, 670, 672. In the last-mentioned case, Cotton, L. J., suggested a question whether the right to a good title is an implied term in the contract or a collateral right given by the law. It is submitted, however, that the obligation to show a good title on a sale of land is not an undertaking collateral to in the sense of independent of the main contract. Cotton, L. J., quoted the authority of Lord St. Leonards (Sug. V. & P. 16) and Parke, B. (*Doe d. Gray v. Stanion*, *ubi sup.*), for the view that this obligation is an implied term of the contract. The opposite view he rested upon a *dictum* of Grant, M. R., in *Ogilvie v. Foljambe*, 3 Mer. 53, 64. On examining this *dictum*, however, it appears that Grant, M. R., meant to say nothing more than that in the particular case before him the purchaser's right to have a good title was not provided for by the written agreement between the parties. It is true that he spoke of the *controversy* between the parties, as to what title the purchaser could require, as being collateral to the agreement, because no term in the written agreement was sought to be varied or added to; and said that the right to a good title was a right not growing out of the agreement between the parties but given by law. But this surely means no more than that, in the particular case before him, the extent of the purchaser's right to require a good title was a matter depending, not on the express, but on the implied terms of the contract. As the failure to show a good title, on the sale of land, is such a breach of contract as discharges the purchaser from the necessity of performing his part of the agreement, it seems clear that the obligation to show a good title is an integral part of the agreement; see *Puke of St. Albans v. Shore*, 1 H. Bl. 270, 278; *Seaward v. Willock*, 5 East, 198, 202; *Souter v. Drake*, *Ellis v. Rogers*, *ubi sup.*; *Brewer v. Broadwood*, 22 Ch. D. 105, 109; below, Chap. XVIII., § 2. This would not be the case, if the obligation to prove title were strictly collateral to the contract of sale. Breach by the vendor of a *strictly collateral* warranty upon a sale does not discharge the purchaser from the main contract, as in the case of a warranty of quality on the sale of specific goods, where the buyer has had the opportunity of inspecting them; *Street v. Blay*, 2 B. & Ad. 456; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Benjamin on Sale*, 448, 741, 748, 749, 2nd ed.; *Sale of Goods Act*, 1893 (stat. 56 & 57 Vict. c. 71), ss. 53, 62 (1); see below, Chap. XIV., § 1.

showing the dealings therewith and devolution thereof during the period for which title is by law or express agreement required to be shown (c). In the absence of special stipulation this period is, as a rule, forty years (d). The vendor is also bound to verify the abstract by producing proper evidence of all the deeds, wills and other documents appearing on the abstract and of all material facts stated therein, such as births, deaths, marriages or bankruptcies (e); and he is bound to prove the identity of the property sold with that to which the documents of title relate (f). But the purchaser, in the absence of stipulation to the contrary, must now bear the expense of producing all documents of title, which are not in the vendor's possession (g), and of procuring all other evidence of title which the vendor has not in his possession (h). The purchaser also bears all expense of the examination of the title deeds by his solicitor (i). The vendor is further bound to produce land corresponding substantially in all respects with the description contained in the contract and available to be transferred to the purchaser in fulfilment of the agreement (k). If the title shown be accepted, the vendor is bound to convey the property to the purchaser free from all incumbrances: unless of course the purchaser should have agreed to take the

(c) Sug. V. & P. 406; *Re Johnson and Tustin*, 30 Ch. D. 42.

(d) Stat. 37 & 38 Vict. c. 78, s. 1.

(e) Sug. V. & P. 406, 414 et seq., 447—450; 1 Dart, V. & P. 142, 143, 310 et seq., 407, 5th ed., 159, 160, 350 et seq., 470, 6th ed., 155, 156, 345 et seq., 481, 7th ed.; 1 Davidson, Prec. Conv. 550, 4th ed., 457, 5th ed.

(f) *Flower v. Hartopp*, 6 Beav. 476; *Carling v. Austin*, 2 Dr. & Sm. 129; 1 Davidson, Prec. Conv. 557, 4th ed., 463, 5th ed.

(g) See *Re Willett and Argenti*, Times L. R. 476; *Re Stuart &*

Olivant and Seadon's Contract, 1896, 2 Ch. 328.

(h) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 6, reversing the previous rule.

(i) Sug. V. & P. 406, 429, 430; Wms. Conv. Stat. 47—50.

(k) See *Halsey v. Grant*, 13 Ves. 73, 77—79; *Flight v. Booth*, 1 Bing. N. C. 370; *Re Arnold*, 14 Ch. D. 270; *Jacobs v. Revell*, 1900, 2 Ch. 858; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258; below, Chap. XII., § 4.

property subject to any specified incumbrances (*l*). The vendor is therefore bound, on payment of the purchase-money, to execute a proper deed of conveyance to the purchaser of the estate sold (*m*), and to put the purchaser into possession of the land so assured (*n*). And in the deed of conveyance the vendor must give the usual vendor's covenants for title (*o*). But the purchaser must bear the expense of preparing this conveyance; although, in the absence of special stipulation, the expense of the concurrence therein of all necessary parties other than the vendor (such as mortgagees or incumbrancers) and of the execution thereof by the vendor will fall on the vendor (*p*). The vendor is also bound to hand over to the purchaser on completion all deeds and other muniments of title relating solely to the property purchased (*q*); and must, as a rule, furnish the purchaser, at the purchaser's expense (*r*), with a proper statutory acknowledgment of right to production and undertaking for safe custody of all such documents, necessary to make a good title, as may be withheld from the purchaser, either because they relate to other property retained by the vendor or because their custody rightly belongs to some other person than the vendor (*s*). The chief duties of the purchaser under a contract for sale of land

(*l*) Wms. Real Prop. 452, 13th ed., 594, 595, 21st ed.

(*m*) *Re Cary Elves' Contract*, 1906, 2 Ch. 143, 149.

(*n*) *Engell v. Fitch*, L. R. 4 Q. B. 659; *Royal Bristol, &c. Building Society v. Bomash*, 35 Ch. D. 390.

(*o*) See post, p. 46.

(*p*) Sug. V. & P. 561, see 557-8; Dart, V. & P. 707, 721, 722, 5th ed.; 798, 814, 6th ed.; 714, 723, 7th ed.; 1 Davidson, Prec. Conv. 570-2, 612, 4th ed., 477-9, 5th ed.; *Re Sander and Walford's Contract*, 1900, W. N.

183; 83 L. T. 316.

(*q*) Sug. V. & P. 407, 433; *Re Duthy and Jesson's Contract*, 1898, 1 Ch. 419.

(*r*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 4).

(*s*) *Cooper v. Emery*, 1 Ph. 388; Sug. V. & P. 446-450, 453; stat. 44 & 45 Vict. c. 41, s. 9; the vendor must also furnish the purchaser with attested copies of such last-mentioned muniments of title, if the purchaser require them, but at the purchaser's expense; stat. 44 & 45 Vict. c. 41, s. 3 (6).

are to examine the evidence of title offered by the vendor, and if and when a good title is shown, to accept the title, to prepare a conveyance of the property and tender the same to the vendor for his execution, and thereupon to pay the price (*t*) and to take the conveyance accordingly (*u*).

The most prominent term of the contract is that which requires the vendor to show a good title. This obligation is the cause of most of the disputes and litigation between buyers and sellers of land. As is well known, the procedure usually adopted to secure the fulfilment of the vendor's duties is for the purchaser's advisers, after they have perused the abstract of title, to send in written requisitions dealing with the points in which they consider the title to be deficient or insufficiently proved or the vendor's obligations to be otherwise imperfectly discharged. To these requisitions the vendor returns written answers confessing or repudiating his liability to comply with them, as the case may be. Unless he accede to every requisition, his answers will evoke replies from the other side; and these again will demand further response. So the contest continues until all grounds of difference are removed, the title is accepted, and the parties proceed to completion, or the questions on which neither party will give way are submitted to the determination of the Court. In advising as to the conduct of these negotiations, it is of course of the highest importance to know when to insist and when to yield. On each point the conveyancer's attitude will be determined by the countenance he may expect his contention to receive from the Court, in case he should fail to convince his opponent; and at every step he must

Proof of title.

Requisitions and answers.

(*t*) *Baxter v. Lewis*, Forrest, 61: Sug. V. & P. 240, 241.
Martin v. Smith, 6 East, 555: *in Re Cary Elwes' Contract*,
Poole v. Hill, 6 M. & W. 835: 1906, 2 Ch. 143.

consider the alternative of submission or litigation. It is thought therefore that, before entering into a detailed examination of the terms of the contract, it will be well to take a brief survey of the remedies provided to secure its performance and of the principles on which the Court will administer relief against its breach (*x*).

Remedies for
breach of the
contract.

1. Rescission
and *restitutio*
in integrum.

2. Action for
damages.

In the case of a breach of any of the main duties of the contract (*i.e.*, those duties of which the performance by one of the contractors is a condition precedent to the other party's liability, as for the vendor to show a good title to or to convey the property sold or for the purchaser to pay the price (*y*)), the party injured is at liberty, where the contractors can be restored to their former position, either to rescind the contract and to obtain *restitutio in integrum* including the return of any property transferred and the reimbursement of the expenses incurred by him in consequence of the contract, or to affirm the contract and recover damages thereunder for the breach. These rights are given by the common law: but the party electing to rescind the contract for such a cause may either bring an action for the required return of property or reimbursement of money under the common law jurisdiction of the Court, or sue under its equitable jurisdiction to enforce rescission and procure the consequent restitution. Where the contract has been so far performed that *restitutio in integrum* is impossible, or where the duty broken is such that its performance is *not* a condition precedent to the other party's liability, the party aggrieved is not entitled to rescind the contract, and his only remedy *at common law* is to sue for damages in affirmance of the contract (*z*). The damages recoverable by a vendor of land for breach

Damages

(*x*) The remedies for breach of the contract are fully discussed below, Chap. XIX.

(*y*) See above, pp. 32, and n. (*b*), 33-35.

(*z*) See below, Chap. XIX., §§ 1, 2.

of the contract for sale are governed by the general common law rule as to the measure of damages, by which the parties are to be placed in the same position, so far as can be attained by a money payment, as if the agreement had been actually performed (*a*). Thus if the vendor have conveyed the land to the purchaser without receiving payment, he can recover the whole price. But if he sue at law for breach of contract, without having parted with his legal estate in the land, he cannot recover the full price as damages, but is limited to the amount of the loss he has actually sustained (*b*). The damages recoverable at law by a purchaser of land for breach of the contract are regulated by an exceptional principle; and, as a rule, he is not enabled to recover any damages for loss of his bargain, but can only obtain reimbursement of his expenses of investigating title, &c. and the amount of his deposit, if any (*c*). This exception to the common law rule regarding damages for breach of contract seems to have been allowed in consideration of the difficulties attending the fulfilment of the vendor's obligation to show a good title. But the most effective remedy of either party is one which the common law did not afford, and which is granted or withheld on principles entirely different from those of the parties' legal liability for breach of their agreement—that is, to enforce the specific performance of the contract under the equitable jurisdiction of the Court. The administration of this relief, though in unobjectionable cases it is granted as much of course as damages are given at law (*d*), is nevertheless held to be in the discretion of the Court—a discretion however which is

recoverable by
the vendor—

by the
purchaser.

3. Action for
specific per-
formance.

(*a*) Parke, B., *Robinson v. Harman*, 1 Ex. 850, 855; *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249, 253; see below, Chap. XIX., § 2.

(*b*) *Laird v. Pim*, 7 M. & W. 474.

(*c*) *Fhureau v. Thornhill*, 2 W.

Bl. 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158; see below, Chap. XIX., § 2.

(*d*) Grant, M. R., *Hall v. Warren*, 9 Ves. 605, 608; *Hexter v. Pearce*, 1900, 1 Ch. 341, 346; *Rudd v. Lascelles*, ib. 815, 817.

not arbitrary or capricious, but judicial, to be exercised according to fixed rules and principles (*e*). To obtain a decree of specific performance is not a matter depending merely on proof of the contract and refusal to perform it, but the Court will have regard to circumstances outside the contract, and especially to the conduct of the parties, and, considering these, will determine whether it is equitable (that is, in accordance with the principles by which Courts of Equity are guided) to grant the desired relief or not (*f*). Thus it is that in deciding whether the specific performance of a contract should be enforced, the Court enters into considerations, which it would not examine in adjudging what relief either party should have for a breach of the same contract at law (*g*). For example, a vendor of land will not be entitled to enforce specific performance of the contract unless his conduct has conformed to the standard of fair dealing, which the Courts of Equity have set; although he may be allowed at the same time to stand upon his contractual rights at common law, and to exact his full measure of compensation thereunder. If therefore special stipulations restrictive of the purchaser's rights be inserted in the contract in a manner which a Court of Equity regards as unfair, the Court will not grant specific performance of the contract at the instance of the vendor (*h*); notwithstanding that the vendor may be able to insist on those same stipulations in any proceedings in which the relief administered is determined solely by the rules of law (*i*). So also the

Unfairness.

(*e*) Eldon, C., *White v. Damon*, 7 Ves. 30, 35; Romilly, M. R., *Haywood v. Cope*, 25 Beav. 140, 151; Lord Chelmsford, *Lamare v. Dixon*, L. R. 6 H. L. 414, 423.
(*f*) *Clowes v. Higginson*, 1 V. & B. 524, 527; *Lamare v. Dixon*, L. R. 6 H. L. 414, 423, 428.

(*g*) See below, Chap. XIX., § 3.

(*h*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*i*) *Re Davis and Carey*, 40 Ch. D. 601, 607; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Scott v. Alvarez*, 1895, 2 Ch. 603; see below, Chap. VI

Court may decline to enforce the specific performance of a contract on the ground that that would involve great hardship on the contractor in default, but may at the same time adjudge him to be liable in damages for a breach of the agreement (*k*). Besides an action for damages at law or specific performance in equity, there is another proceeding in which questions arising between vendors and purchasers of land may be decided. This is a summons under section 9 of the Vendor and Purchaser Act, 1874 (*l*). In such a summons the rights of the parties may be measured by the rules of equity or law, according to the relief claimed. Questions, of which the solution must result in binding either party to complete the purchase (as where it is claimed that the vendor has shown such a title as the purchaser is bound to accept) are determined according to the rules of equity applied in actions for specific performance. But if the purchaser claims not only to be relieved from performing the contract, but also to have his deposit (if any) returned to him, and his expenses of investigating the title paid, he is virtually pursuing the remedy accorded for breach of the contract in a Court of law (*m*); and his title to relief will be governed strictly by the rules of law, without reference to the considerations which would guide the Court in granting or withholding specific performance (*n*).

4. Vendor and purchaser summons.

To give a clearer view of the terms implied by law in an open contract of sale, the writer has endeavoured to express them in a manner similar to that in which special conditions of sale are usually drawn. This will facilitate the comparison of the terms of an open contract

(*k*) See *Tamplin v. James*, 15 Ch. D. 215, 222, 223; *Van Praagh v. Everidge*, 1902, 2 Ch. 266, 272, 273, reversed on a different point, 1903, 1 Ch. 434; below, Chap. XIII., § 1.

(*l*) Stat. 37 & 38 Vict. c. 78.

(*m*) Above, p. 37; *Re Hargreaves and Thompson's Contract*, 32 Ch. D. 454.

(*n*) See the cases cited in note (*i*), above; below, Chap. XIX., § 4.

with those of a formal agreement containing the usual conditions. It will be remembered that the Statute of Frauds requires a written and signed memorandum describing (at least) the parties, the property sold and the price (o). This may take the following form :—

Formal
memorandum
of an open
contract.

MEMORANDUM OF AN AGREEMENT made this first day of May, 1898, between A. B., of &c. [*Insert description*] and C. D., of &c. [*Insert description*] whereby the said A. B. agrees to sell and the said C. D. to buy at the price of 4,000*l.*, the freehold in fee simple free from incumbrances of ALL THAT &c. [*Insert description of the property*]. In witness whereof the said parties have hereunto set their hands the day and year above named.

(Signed) A. B.
 C. D.

Contract
formed by
letters.

Open contracts, however, are very rarely made by the signature of a formal memorandum. They usually result from the acceptance of a written offer, as thus :—

THE WHITE HOUSE,
GREENFIELD, SUSSEX.
1 June, 1898.

DEAR SIR,

I would take 4,500*l.* for this house with the garden and two fields adjoining.

Yours faithfully,
A. B.

C. D., Esq.

(o) Above, pp. 4, 17.

10, BLANK STREET, W.
2 June, 1898.

DEAR SIR,

I accept the offer made in your letter of yesterday.

Yours faithfully,
C. D.

A. B., Esq. (oo).

In such cases it is understood that the interest sold is the freehold in fee simple free from incumbrances, unless it appear from the memorandum that some lesser interest is the subject of the contract, or that the purchaser is to take the property subject to certain incumbrances (*p*). Whether the memorandum of an open contract be formal or informal, the agreement comprises the following terms:—

The unincumbered fee simple contracted for, unless the contrary appear.

Terms of an open contract.

1.—(1.) The vendor shall show a good title to the property sold.

Vendor to show a good title.

(2.) In order to discharge this obligation, he shall deliver at his own expense to the purchaser a proper abstract of title to the property, showing the dealings therewith and devolution thereof for the forty years next before the contract, and shall verify the abstract by producing proper evidence of all the deeds, wills and other documents appearing on the abstract and of all material facts stated therein, and shall prove the identity of the property described in the contract with that to which the muniments of title relate (*q*).

Delivery and verification of abstract.

Proof of identity.

(3.) The vendor shall prove forty years' seisin in fee of the property sold. If therefore an instrument of disposition be offered in unsupported proof of the

Necessity of a good root of title.

(oo) See above, pp. 9, 18.

(*p*) *Hughes v. Parker*, 8 M. & W. 244; *Bower v. Cooper*, 2 Hare, 408; Sug. V. & P. 298; *Phillips*

v. Caldcleugh, L. R. 4 Q. B. 159.

(*q*) Above, pp. 32, 33; *Re Wallis and Groul's Contract*, 1906, 2 Ch. 206.

commencement of the vendor's title, it must be a good root of title; that is to say, it must deal with or prove on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, contain a description by which the property can be identified, and show nothing to cast any doubt on the title of the disposing parties. Otherwise, any deficiency in any of the above respects must be made good by further evidence (*r*).

Proper evidence of title.

(4.) Proper evidence of title means such evidence as a court of equity will force a purchaser to accept on a sale, whether admissible in litigation or not (*s*).

Recitals, &c. in instruments twenty years old to be *prima facie* evidence.

(5.) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and description (*t*).

Production of and inquiries as to the title earlier than for the last forty years not to be required or made.

(6.) The purchaser shall not require the production, or any abstract or copy, of any deed, will, or other document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals

(*r*) *Parr v. Lovegrove*, 4 Drew. 170; 1 Dart, V. & P. 295, 296, 5th ed.; 337, 6th ed.; 331, 7th ed.; *Re Cox & Neve's Contract*, 1891, 2 Ch. 109, 118.

(*s*) See below, Chap. IV., sect. 3.

(*t*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 2).

contained in the abstracted instruments of any deed, will, or other document forming part of that prior title are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise (*u*).

2.—(1.) The vendor shall also produce, as available to be transferred to the purchaser in fulfilment of the contract, a piece or pieces of land substantially identical as respects tenure, incidents of tenure, estate, situation, quantity and otherwise, with the property described in the contract (*x*).

Vendor must produce 'a property identical with that described in the contract.

(2.) If the property, which the vendor is able to convey in fulfilment of the contract for sale, shall not be substantially identical with the property described in the contract, the vendor shall not enforce the contract at law or in equity, and the purchaser may treat the contract as broken (*y*); but if in such case there be a mere deficiency (whether of estate, area or otherwise) capable of assessment at a money value, the purchaser may in equity exact the specific performance of the contract with compensation for the deficiency, provided this will not prejudice third parties (*z*), or involve great hardship on the vendor (*a*).

Substantial errors of description to the purchaser's detriment.

(*u*) Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (3).

(*x*) Above, p. 33.

(*y*) *Flight v. Booth*, 1 Bing. N. C. 370; *Pulsford v. Richards*, 17 Beav. 87, 95, 96; *Swaishand v. Dearsley*, 29 Beav. 430; *Torrance v. Bolton*, L. R. 8 Ch. 118; *Re Arnold*, 14 Ch. D. 270; *Re Breyfus and Masters' Contract*, 39 Ch. D. 110; *Re Fawcett and Holmes' Contract*, 42 Ch. D. 150; *Jacobs v. Revell*, 1900, 2 Ch. 858; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93; *Dart*, V. & P. 134, 135,

1072—1078, 5th ed.; 151, 152, 1198—1205, 6th ed.; 147, 1086—1092, 7th ed.; Fry, Sp. Perfee. §§ 1209, 1217—1238.

(*z*) *Thomas v. Dering*, 1 Keen, 729, 6 L. J. N. S. Ch. 267; *Willmott v. Barber*, 15 Ch. D. 96.

(*a*) *Mortlock v. Buller*, 10 Ves. 292, 315; *Castle v. Wilkinson*, L. R. 5 Ch. 534, 536; *Hooper v. Smart*, L. R. 18 Eq. 683; *Horricks v. Rugby*, 9 Ch. D. 180; Fry, Sp. Perfee. §§ 1209, 1210, 1257 sq.; *Rudd v. Lascelles*, 1900, 1 Ch. 815.

Insubstantial errors of description of the same kind.

(3.) If the property available to be conveyed by the vendor in fulfilment of the contract shall correspond substantially with that described therein, but owing to an error innocently made by the vendor there shall be some small and insubstantial deficiency either of quantity or estate or in some other respect, the vendor (though he shall not enforce the contract at law), may nevertheless in equity exact the specific performance thereof, on giving compensation for the error (*b*); and the purchaser shall have the like right to enforce specific performance with compensation (*c*), but shall not be entitled to insist on his legal right to rescind the contract or recover damages for its breach (*d*), if the vendor shall be willing to make compensation and shall assert his own right to specific performance on those terms (*e*).

Errors of description made by the vendor to his own detriment.

(4.) If the vendor by his own fault or inadvertence shall have described in the contract of sale a property more extensive than that which he meant to sell, and is able to convey the property described in fulfilment of the agreement, then (whether the error be substantial or insubstantial) he shall have no right to enforce the contract at law or specifically otherwise than according to its terms or to oblige the purchaser to allow him compensation (*f*); and in case of the vendor's refusal so to perform the contract, the purchaser shall be entitled,

(*b*) *Calcraft v. Roebuck*, 1 Ves. jun. 221; Fry, Sp. Perfec. §§ 1213, 1229—1238.

(*c*) This follows, *a fortiori*, from the proposition stated in the preceding paragraph.

(*d*) At law the vendor's failure in any respect, however small, to produce a property answering to that described in the contract is a breach of one of his main duties under the agreement; see above, pp. 33, and n. (*k*), 36, Chap. XIII. § 1.

(*e*) This is a consequence of the vendor's right to enforce specific

performance with compensation, and of the prevalence of this equitable right over the purchaser's rights at common law; see *Reynolds v. Nelson*, 6 Madd. 290; *Frank v. Basnett*, 2 My. & K. 618; *Phelps v. Prothero*, 7 De G. M. & G. 722; *Hall, V.-C., Tredegar v. Windus*, L. R. 19 Eq. 607, 615; Judicature Act, 1873, stat. 36 & 37 Vict. c. 66, ss. 24 (5), 25 (11).

(*f*) See *Manser v. Back*, 6 Hare, 443, 447, 448; *Alvanley v. Kinnaird*, 2 Mac. & G. 1, 8; below, Chap. XII. § 4.

not only to insist on his legal rights (*g*) arising from the vendor's breach, but also to enforce the contract specifically (*h*); except that, if the error were innocently made and be so serious that it would be a great hardship on the vendor to oblige him to perform the contract specifically, the purchaser shall not be entitled to enforce specific performance unless he choose to take without compensation what the vendor really intended to sell (*i*).

3.—(1.) The vendor shall produce all the evidence of title, which is in his own possession, at the proper place for verification of the abstract, that is to say, at his own residence, upon or near the property sold or in London; or he shall pay the extra expense occasioned to the purchaser by the examination of any such evidence elsewhere; but he may produce any documents of title, which are in the possession of other persons than himself, at the place where such documents are, and the purchaser shall pay any extra expense so caused of the examination of such documents by him or his solicitor (*k*).

Place of verification of the abstract.

(2.) The purchaser shall pay the expense of procuring and producing all evidence of title which he may require but which is not in the vendor's possession (*l*).

Expense of evidence not in vendor's possession.—

(3.) The vendor shall at his own expense procure all documents of title, which are required by law to be

And of stamping unstamped documents.

(*g*) Above, p. 37.

(*h*) See *Tomlin v. James*, 15 Ch. D. 215, 222, 223; below, Chap. XIII. § 1.

(*i*) *Neup v. Abbott*, C. P. Coop. 333; *Manser v. Buck*, 6 Hare, 443; *Abenden v. Knemurd*, 2 Mac. & G. 1; *Wood v. Searth*, 2 K. & J. 33; *Scott v. Littledale*, 8 E. & B. 815; *Webster v. Cecil*, 30 Beav. 62; *Durham v. Legard*, 34 Beav. 611; *Rudd v. Laseelles*, 1900, 1 Ch. 815, 820; see below, Chap. XII. § 4; Chap. XIII. § 1.

(*k*) *Sharp v. Page*, Sug. V. & P. 439; *Hughes v. Wympe*, 8 Sim. 85; Sug. V. & P. 429, 430; 1 Dart, V. & P. 407, 408, 5th ed.; 470, 471, 6th ed.; 481, 482, 7th ed.; Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*l*) This is the effect of Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (6); see *Re Willett and Argent*, 5 Times L. R. 476; *Re Stuart, Glavant and Seaton's Contract*, 1896, 2 Ch. 328.

stamped but are unstamped or insufficiently stamped, to be properly stamped (*m*).

Purchaser to accept the title, if shown to be good.

4. The purchaser shall at his own expense examine the abstract of title and the evidence offered in support of it; and if and so soon as a good title shall be shown, he shall accept the title (*n*).

Completion of the purchase.

5.—(1.) The purchase shall be completed so soon as the vendor shall have shown a good title, that is to say, when the title contracted for shall have been proved upon the abstract and by all the evidence necessary to verify the same (*o*). The purchaser shall thereupon prepare at his own expense a proper conveyance of the property to the purchaser or as he shall direct (*p*), and shall tender the same to the vendor for execution, at the same time tendering the whole amount due in payment of the purchase-money (*q*); and the vendor shall thereupon accept such payment and execute the conveyance at his own expense and shall give possession of the property to the purchaser (*r*), and the purchaser shall take such conveyance accordingly (*s*).

(2.) A proper conveyance of the property means an assurance effectual to vest the whole estate contracted for, both legal and equitable, in the purchaser or his nominee, and containing the usual covenants for title by the vendor. These are covenants for right to convey, quiet enjoyment, freedom from incumbrances and further assurance, extending to indemnity against anything done, omitted or knowingly suffered by the vendor and his predecessors in title back to and including the last person who became entitled to the property on

(*m*) *Whiting to Loomes*, 14 Ch. D. 822, 17 Ch. D. 10; *Re Lovell and Collard's Contract*, 1907, 1 Ch. 249.

(*n*) Above, p. 35.

(*o*) Above, p. 33.

(*p*) *Egmont v. Smith*, 6 Ch. D. 469, 474.

(*q*) Above, p. 35.

(*r*) Above, p. 34.

(*s*) *Re Cary Elwes' Contract*, 1906, 2 Ch. 143.

a sale or another occasion on which proper covenants for title were given (*t*).

(3.) If the state of the vendor's title be such that, in order to convey to the purchaser the whole estate contracted for, other parties than the vendor must join in the conveyance, the vendor shall at his own expense procure all such other necessary parties to join in and execute the conveyance (*u*).

6.—(1.) The vendor shall deliver to the purchaser on completion all muniments of title relating solely to the property purchased (*x*), but he shall retain any documents of title which are in his own possession and relate to any part of an estate retained by him as well as to the property sold (*y*): and he shall not be required to obtain and hand over to the purchaser any documents of title, which relate to other property as well as to the property sold, and of which any person other than the vendor is entitled to retain possession (*z*).

Vendor to deliver over the muniments of title on completion.

(2.) The vendor shall give or procure to be given to the purchaser proper statutory acknowledgments of right to production and delivery of copies, and proper statutory undertakings for safe custody, and also (if required by the purchaser, but at his expense) attested copies of all such documents of title as are not handed over to the purchaser on completion and are necessary to make a good title according to the contract; except documents in public or official custody and other docu-

Or give proper statutory acknowledgments and undertakings as to any documents of title rightfully retained.

(*t*) *Church v. Brown*, 15 Ves. 258; *Williams, Real Prop.* 447 - 449, 13th ed.; 607-610, 21st ed.; *Williams, Conv. Stat.* 74-86.

(*u*) *Esdaile v. Oxenham*, 3 B. & C. 225, 228, 229; *Sug. V. & P.* 557, 558, 561; 2 *Dart, V. & P.* 707, 721, 722, 5th ed.; 798, 814, 6th ed.; 714, 723, 7th ed.; 1 *Davidson, Prec. Conv.* 572, 612,

4th ed.; *Re Sander and Walford's Contract*, 1900, W. N. 183, 83 L. T. 316.

(*x*) Above, p. 34; below, Chap. XII. § 3.

(*y*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 5); see below, Chap. XII. § 3.

(*z*) *Sug. V. & P.* 446-450, 453; 1 *Dart, V. & P.* 626, 6th ed.; 578, 7th ed.

ments, not being in the vendor's possession or power, of which the purchaser can always obtain good evidence himself: but the purchaser shall not require any fresh acknowledgment, undertaking or covenant to be given to him as regards any documents lawfully retained by some other person than the vendor, for the production and safe custody whereof the purchaser will on completion have the right to enforce at law a proper statutory acknowledgment and undertaking or a covenant given to the vendor or his predecessor in title (*a*).

(3.) A proper statutory acknowledgment or undertaking can only be given by the person who retains possession of the documents (*b*).

(4.) Such statutory acknowledgments and undertakings as the purchaser can and shall require shall be furnished at his expense; but the vendor shall bear the expense of the perusal and execution thereof on behalf and by himself and all necessary parties other than the vendor (*c*).

(5.) The inability of the vendor to furnish the purchaser with proper statutory acknowledgments and undertakings with regard to any documents of title shall not be an objection to title in case the purchaser will on completion of the contract have an equitable right to the production of such documents (*d*).

Time for
carrying out
the contract.

7.—(1.) Any act necessary to be done by either party in order to carry out the contract, such as the delivery of¹ the abstract, the statement of the objections to or

(*a*) *Cooper v. Emery*, 1 Ph. 388; Sug. V. & P. 446—450, 453, and n.; Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, ss. 3 (6), 9 (8, 11); see below, Chap. XII. § 3.

(*b*) See Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 9 (1, 9).

(*c*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 4),

as modified by Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 9 (8, 11).

(*d*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 3), as modified by Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 9 (8, 11).

the acceptance of the title, or the preparation of the conveyance, shall be done within a reasonable time (*e*).

(2.) In the case of unreasonable delay by either party in the performance of any act necessary to carry out the contract, the other party may serve a notice on the party in default requiring him to do the act, which he delays to perform, within some time (which must be a reasonable space of time as from the date of the notice) specified in the notice, and intimating the other party's intention to put an end to the contract, if the notice be not complied with; and if such a notice be served and be not complied with, the party in default shall not enforce the specific performance of the contract in equity (*f*), and shall be liable at law for a breach of the contract (*g*).

8.—(1.) As from the date of the contract for sale the property shall in equity belong to the purchaser, with this exception, that the vendor shall until the proper time for completion take the rents, crops and other ordinary profits for his own use: but with this exception the vendor shall in equity have no other beneficial interest in the property than a lien for the price (*h*).

Rights of property and possession pending completion.

(2.) The vendor shall be entitled to an apportioned part of all rents accrued due at but not payable until after the proper time for completion (*i*).

(*e*) Romilly, M.R., *Baker v. Metropolitan Ry. Co.*, 31 Beav. 504, 509, 510; Fry, J., *Green v. Serin*, 13 Ch. D. 589, 599; *Houce v. Smith*, 27 Ch. D. 89, 103, 104; Romer, J., *Compton v. Bagley*, 1892, 1 Ch. 313, 321.

(*f*) *Spurrier v. Hancock*, 4 Ves. 667; Langdale, M.R., *Taylor v. Brown*, 2 Beav. 180, 183; Romilly, M.R., *Parkin v. Thorold*, 16 Beav. 69, 71; Pegg v. Wisden, 16 Beav. 239, 244; Fry, J., *Crawford v. Toogood*, 13 Ch. D. 153, 158; *Green v. Serin*, 13 Ch. D. 589,

599—601.

(*g*) *Compton v. Bagley*, 1892, 1 Ch. 313.

Ch. Paine v. Moller, 6 Ves. 349, 352; Plumer, M.R., *Wall v. Bright*, 1 J. & W. 494, 500; Cairns, C., *Shaw v. Foster*, L. R. 5 H. L. 321, 338; Jessel, M.R., *Lysaght v. Edwards*, 2 Ch. D. 499, 505-8; *Re Cary Elwes' Contract*, 1906, 2 Ch. 143, 149; Dart, V. & P. 247, 649, 5th ed.; 285, 733, 6th ed.; 289, 672, 7th ed.

(*i*) Apportionment Act, 1870, stat. 33 & 34 Vict. c. 35, s. 2.

(3.) Pending the completion of the purchase the vendor shall retain possession of the property sold, and shall manage and preserve it with the same care as a trustee is bound to use with regard to the property subject to his trust (*k*).

(4.) The vendor shall pay all rates, taxes and other outgoings payable in respect of or charged upon the property sold up to the proper time for completion.

(5.) Of such outgoings as are apportionable by law he shall only pay a due proportion up to the proper time for completion: but he shall discharge all outgoings not apportionable and becoming charged on the premises before such time, notwithstanding that they may not be payable until after such time (*l*).

Interest payable if completion be delayed.

9.—(1.) If the purchase shall not be completed at the proper time (*m*), the purchaser shall pay interest at the rate of 4*l.* per cent. per annum (*n*) on the price agreed upon from that time until the completion of the purchase, and shall be entitled as from that time to the rents and other ordinary profits of the property (*o*): but the vendor shall retain possession or receipt of the rents and profits until the purchase shall be actually completed, when he shall account to the purchaser for all rents and profits accrued due since the proper time for completion (*p*).

(*k*) *Phillips v. Silvester*, L. R. 8 Ch. 173; *Egmont v. Smith*, 6 Ch. D. 469; *Royal Bristol, &c. Bdq. Soc. v. Bomash*, 35 Ch. D. 390; *Clarke v. Ramuz*, 1891, 2 Q. B. 456; see 2 Dart, V. & P. 649-651, 5th ed.; 733-735, 6th ed.; 673-675, 7th ed.

(*l*) *Carrodus v. Sharp*, 20 Beav. 56; *Midgley v. Coppock*, 4 Ex. D. 309; *Re Bettesworth and Richer*, 37 Ch. D. 535; *Tubbs v. Wynne*, 1897, 1 Q. B. 74; *Barsh v. Tagg*, 1900, 1 Ch. 231; *Stock v. Meakin*, ib. 683; see *Egg v. Blayne*, 21 Q. B. D. 107.

(*m*) See above, p. 46.

(*n*) This is the rate usually allowed in equity; Sug. V. & P. 643; 2 Dart, V. & P. 627, 5th ed.; 708, 6th ed.; 650, 7th ed.; 1 Davidson, Prec. Conv. 575, 576, 4th ed.; 483, 5th ed.; *Re Davy*, 1908, 1 Ch. 61.

(*o*) *Paine v. Meller*, 6 Ves. 349, 352; *Hardwicke v. Sandys*, 12 M. & W. 761; *Monro v. Taylor*, 8 Hare, 51, 70, 3 Mac. & G. 713, Sug. V. & P. 627.

(*p*) *M'Namara v. Williams*, 6 Ves. 143; see below, Chap. XI. § 1.

(2.) If the vendor shall be in occupation of the property sold, he shall pay a fair occupation rent from the proper time for completion until the time of actual completion (*g*).

(3.) If the delay in completion shall be attributable to the vendor, and the purchaser shall appropriate his money to the purchase by depositing it in a bank or otherwise, and giving the vendor notice of such appropriation, the purchaser shall, as from the time of such appropriation, pay no more interest on the purchase-money, except such interest, if any, as he shall receive in respect of such deposit (*r*); but if the delay in completion shall be attributable to the purchaser, the purchaser shall not be exonerated from his liability to pay interest on the purchase-money by any such appropriation of his money to the purchase (*s*).

We have already briefly described the contracting parties' remedies by application to the Court (*t*). It remains to inquire whether, in the absence of express stipulation, a vendor of land has the right to re-sell, in case the purchaser make default in performing the contract. This appears exceedingly doubtful. It was incidentally held by Bacon, V.-C., in *Noble v. Edwards* (*u*), that, if the purchaser unjustly repudiate

Has the vendor a right of re-sale without express stipulation?

(*g*) *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 18 Jur. 843; *Metropolitan Ry. Co. v. Dufries*, 2 Q. B. D. 189, 387. See *Leggott v. Metropolitan Ry. Co.*, L. R. 5 Ch. 716.

(*r*) *Roberts v. Massey*, 13 Ves. 561; *Regent's Canal Co. v. Ware*, 23 Beav. 575, 587; 1 Davidson, Prec. Conv. 573, 574, 4th ed.; 480, 481, 5th ed.

(*s*) Sug. V. & P. 628; 1 Dart, V. & P. 627, 628, 634-636, 5th ed.; 708, 709, 716-18, 6th ed.; 650, 651, 657-659, 7th ed.

(*t*) Above, pp. 36-39.

(*u*) 5 Ch. D. 378, 388. It does not appear that the decision of

this point was really necessary. The action was brought by a vendor, who had re-sold at a loss, to enforce his claim at common law for damages for breach of contract. All that the V.-C. decided was that the vendor was entitled to sue for the difference between the original contract price and the price on the re-sale: see 5 Ch. D. 392. But it seems that the vendor was clearly entitled to make this claim at law, even though the re-sale were wrongful: see *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Page v. Cowasjee*, L. R. 1 P. C. 127; *Benjamin on Sale*, 648, 654, 2nd ed.

the contract, as by refusing to accept a good title, the vendor may re-sell, after notice to the purchaser of his intention to do so, and sue the purchaser for the amount of any deficiency in price occurring on the re-sale. The V.-C.'s judgment was reversed for other reasons by the Court of Appeal, which made no pronouncement as to the correctness of his decision on the point in question. And his decision has been accepted by the editors of Dart's Vendors and Purchasers (*v*), and Davidson's Precedents in Conveyancing (*w*), as an authority for the proposition that the vendor of land has the right of re-sale, on breach of contract by the purchaser, without any express stipulation to that effect. But the correctness of this opinion seems questionable. The V.-C. held (*x*) that the common law gives to the vendor of land the same right of re-sale, in case of the purchaser's default, as it gives to a vendor of chattels. It is to be observed, however, that the assertion of a right *at common law* for the vendor of goods to re-sell them upon the buyer's default rests upon very slender authority (*y*). And the utmost extent of the common law

(*v*) P. 185, 6th ed. (*w*) P. 476, 5th ed. (*x*) 5 Ch. D. 388.

(*y*) In Benjamin on Sale, 2nd ed. 1873, pp. 649, 655, it is laid down that the cases decide expressly that the vendor has no right to re-sell, for they determine that he is responsible for nominal damages for non-delivery of the goods where there is no difference between the contract and the market price thereof; and in support of this proposition *Valpy v. Oakeley*, 16 Q. B. 941, and *Griffiths v. Perry*, 1 E. & E. 680, are cited. But see the view now maintained by the editors of Benjamin on Sale, 934 sq., 5th ed. In *Ex parte Stapleton, Re Nathan*, 1879, 10 Ch. D. 586, it was decided that an unpaid vendor of goods, who had re-sold (after notice of his intention to do so) upon the purchaser's bankruptcy, was entitled to prove for a deficiency in price on the re-sale. But it appears that he would have had this right even though the re-sale were wrongful; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Page v. Cowasjee*, L. R. 1 P. C. 127; *Benj. Sale*, 654, 2nd ed. Mr. M. D. Chalmers, however, in his Digest of the Law of Sale of Goods (1890), sect. 50 (3), evolved out of certain *obiter dicta* in *Page v. Cowasjee*, L. R. 1 P. C. 145; *Lord v. Price*, L. R. 9 Ex. 55, and *Ex parte Stapleton, ubi sup.*, the rule afterwards adopted in the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, s. 48 (3), viz., "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

authorities appears to be to allow to an unpaid vendor of goods a right of sale, after notice, on the buyer's default, to realize his lien for the price, similar to the right of sale, after due demand and notice, given to a pledgee of goods where a day is fixed for payment (z). But the lien, which a vendor of land has for the price pending completion, is a purely equitable charge (a), quite different from the common law right of a pledgee or an unpaid vendor of chattels. It does not appear to follow therefore that a vendor of land can enforce his equitable lien by sale, because an unpaid vendor of goods may, in certain circumstances, realize his common law lien by sale. And the proper remedy to enforce an unpaid vendor's lien on lands sold appears to be to apply to a Court of Equity for an order for sale (b). It is submitted, therefore, that the better opinion is still that expressed, before the case of *Noble v. Edwardes*, by the authors of *Davidson's Precedents in Conveyancing* (c); namely, that a re-sale to enforce the vendor's lien for the price in case of the purchaser's default, can only be lawfully made with the authority of a Court of Equity or Bankruptcy. It appears, however, that, as in the case of goods (d), a re-sale made on the purchaser's default by a vendor of lands, without any express power to re-sell, does not rescind the original contract; that, even if re-sale in such circumstances be unlawful, the vendor may sue the original purchaser or prove in his bankruptcy for any deficiency in price occurring on the re-sale (e); and that, if the re-sale result in an

(z) See preceding note; and *Johnson v. Stear*, 15 C. B. N. S. 330; *Pigot v. Cubley*, ib. 701; *Blackburn, J., Donald v. Suckling*, L. R. 1 Q. B. 585, 616; *Blackburn on Sale*, 325, cited *Benj. Sale*, 644, 2nd ed.

(a) See *Jessel, M.R., Lysaght v. Edwards*, 2 Ch. D. 499, 506, 507; above, p. 49.

(b) *Bowles v. Rogers*, 6 Ves.

95, n.; *Seton on Judgments*, 2290—2294, 6th ed.; see below, Chap. XI. § 1, XVIII. § 2, XIX. § 1.

(c) Vol. i., pp. 568-70, 4th ed.

(d) See *Benj. Sale*, 648, 654, 2nd ed.; *Maclean v. Dunn*, 4 Bing. 722; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Page v. Cowasjee*, L. R. 1 P. C. 127.

(e) *Ex parte Seaforth*, 19 Ves.

excess over the original price, the vendor must pay over the amount of such excess to the original purchaser (*f*). But if re-sale by a vendor of lands on the purchaser's default be unlawful without the authority of the Court, it is questionable whether the vendor would be entitled to recoup himself the expenses of re-sale out of the proceeds thereof (*g*). And it seems very doubtful whether a purchaser on a re-sale made without the authority of the Court would obtain a good title, if he had notice of the original contract for sale (*h*). In this respect the case of lands differs entirely from that of goods, in which the purchaser on a lawful re-sale now obtains a good title under an express enactment in the Sale of Goods Act, 1893 (*i*).

Re-sale as
owner after
a rescission
for the
purchaser's
default—

If the vendor rescind the contract for the purchaser's breach of one of the main duties under the agreement (*k*), he is restored to his former beneficial ownership of the land, and can then *as owner* re-sell or otherwise dispose of it as he pleases (*l*). If he so re-sell for a higher price, such purchase-money is all his own; and if the re-sale produce less than the former contract-price, he must bear the loss himself (*m*). The vendor can

or after
judgment in

235; *Hope v. Booth*, 1 B. & Ad. 498; *Gray v. Gray*, 1 Beav. 199; *Harding v. Harding*, 4 My. & Cr. 514.

(*f*) *Greaves v. Ashlin*, 3 Camp. 426; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680. The contrary appears to be laid down in 1 Davidson, *Prec. Conv.* 570, 4th ed., and 1 Dart, *V. & P.* 185, 6th ed.; 179, 180, 7th ed.; but *Ex parte Hunter*, 6 Ves. 94, 97, cited as the authority for these statements, was a case of re-sale under an express power of re-sale, whereby the original contract is rescinded; *Lamond v. Davall*, 9 Q. B. 1030; *Sug. V. & P.* 39. And it appears from 1 Dart, *V. & P.* 163, 5th ed., that Mr. Dart's statement was

made with respect to such a sale. It seems too that Mr. Davidson's statement was really intended to apply only to such a sale.

(*g*) 1 Davidson, *Prec. Conv.* 570, 4th ed. Note that Bacon, *V.-C.*, decided nothing in *Noble v. Edwards*, 5 Ch. D. 378, 392, as to the vendor's right to recover the expenses of re-sale.

(*h*) He might, of course, obtain a good title as a *bond fide* purchaser *without* notice of the original sale.

(*i*) Stat. 56 & 57 Vict. c. 71, s. 48 (2).

(*k*) Above, p. 34.

(*l*) *Howe v. Smith*, 27 Ch. D. 89, 104, 105.

(*m*) See below, Chap. XIX. § 1.

also sell or otherwise dispose of the land *as owner* after an action for judgment has been recovered by or against him in an damages. action for damages for breach of one of the main duties arising under the contract (*n*).

(*n*) See above, p. 36 ; below, Chap. XIX. § 2.

CHAPTER III.

OF THE USUAL CONDITIONS OF SALE.

Stipulations
usually made
in formal
contracts.

HAVING thus given an outline of the main duties imposed upon the parties to the contract and their remedies for its breach, and attempted to state the terms of an open contract, we will now endeavour to complete our general view of the effect of a sale of land by pointing out in what particulars the rights and obligations of the parties are usually expressed or modified, in formal contracts, by special stipulation. We will first examine the conditions generally made on sales by auction.

Reserving the
right to bid
at an auction.

1. As we have seen, on a sale of land by auction the particulars or conditions must state whether the land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; and if the sale be announced to be without reserve, it will not be lawful for the vendor to bid, either in person or by agent (*a*). It is therefore the practice expressly to reserve to the vendor the right to bid as often as he may please (*b*); and it is usually stipulated that the vendor and his agents may bid as often as he or they may please (*c*), notwithstanding the doubt judicially expressed as before mentioned (*d*) whether it be lawful for a vendor of land to employ more than one puffer at an auction. Where there is to be a reserve price, this

(*a*) Stat. 30 & 31 Vict. c. 48,
s. 5; above, p. 23.

(*b*) Above, p. 24.

(*c*) 1 Davidson, Prec. Conv.

607, 4th ed.; 518, 519, 5th ed.;
1 Key & Elphinstone, Prec. Conv.

258, 4th ed.; 245, 8th ed.

(*d*) Above, p. 23.

should be stated in the conditions, and the right for the vendor or his agents to bid should be reserved as well. It is usually stipulated that, subject to the rights so reserved, the highest bidder shall be the purchaser (*c*). The lowest amount by which the biddings shall advance is generally specified, or else it is provided that the amount of the advance of each bidding shall be regulated by the auctioneer; and the condition is also made that no bidding shall be retracted, the latter stipulation being inserted for whatever it may be worth, notwithstanding that it is thought to be unenforceable. And it is declared that, if any dispute shall arise concerning a bidding, the property shall be put up again and resold (*f*).

2. We have seen that no deposit of any part of the purchase-money can be lawfully demanded after an open contract for sale has been concluded; as the whole price is not payable until the time for completion (*g*). But on sales of land by auction it is always provided that a deposit of a certain proportion (as ten per cent.) of the purchase-money shall be paid by the purchaser immediately on signing the contract (*h*). It is also invariably stipulated that the purchaser shall sign a memorandum of the contract immediately after the sale. This stipulation is absolutely necessary on account of the Statute of Frauds (*i*): but it does not appear that it can be enforced (*k*).

Deposit:
signing a
memoran-
dum.

3. A day is always fixed for the completion of the contract. In such cases it was said that at law time was

Time for
completion.

(*c*) See above, p. 24.

(*f*) See above, p. 20; 1 Davidson, Prec. Conv. 519, 607, 4th ed.; 432, 525, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 257, 258, 4th ed.; 245, 8th ed.

(*g*) Above, pp. 26, 46.

(*h*) 1 Davidson, Prec. Conv. 607, 4th ed.; 519, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258, 4th ed.; 246, 8th ed.

(*i*) Above, pp. 3, 20-22.

(*k*) See above, pp. 20-22.

of the essence of the contract; that is to say, the Courts of Common Law (not unreasonably) held the parties to mean what they said (*l*), and therefore considered that a stipulation to complete the purchase on a given day bound the vendor to have shown and verified a good title and to be ready to convey on that day; in default of which the purchaser was entitled either to rescind the contract and to recover his expenses incurred thereunder (such as his deposit and his costs of investigating the title), or to sue in affirmance of the contract for damages for breach of the agreement (*m*). In equity, however, it was well established that neither party to a contract for sale of land should lose his right to specific performance merely through failure to comply with some stipulation as to time, if time were not of the essence of the contract. That is to say, the Courts of Equity, in administering their own peculiar remedies, held that they were not concluded by the letter of an agreement to do some act within a given time, but would look to what they called "the substance of the contract," and ascertain whether a stipulation as to time were intended to be material or merely formal. And they granted specific relief, if there were no unreasonable delay, notwithstanding the want of exact compliance with a formal stipulation as to time, upon a principle analogous to that on which they decreed the redemption of mortgages after the day fixed for redemption was past (*n*). The nature of this jurisdiction is thus de-

(*l*) *Marshall v. Powell*, 9 Q. B. 779.

(*m*) See above, p. 36; *Berry v. Young*, 2 Esp. 640, n.; *Wilde v. Fort*, 4 Taunt. 334; *Hanslip v. Padwick*, 5 Ex. 615; Sug. V. & P. 257-9; Dart, V. & P. 417, 944, 945, 949, 5th ed.; 482, 1071, 1072, 1076, 6th ed.; 495, 984, 985, 990, 7th ed.

(*n*) *Pincke v. Curteis*, 4 Bro. C. C. 329; *Redesdale, Ir. C.*, *Lennon*

v. Napper, 2 Sch. & Lef. 684; *Eldon, C.*, *Seton v. Slade*, 7 Ves. 265, 273-5; *Radcliffe v. Warrington*, 12 Ves. 326; *Hearne v. Tenant*, 13 Ves. 287; *Hipwell v. Knight*, 1 Y. & C. Ex. 401; *Parkin v. Thorold*, 16 Beav. 59; *Roberts v. Berry*, 3 De G. M. & G. 284; *Fry, Sp. Perf.* § 1072, p. 489. In recent times, equity judges seem to have thought it necessary to allege that, notwithstanding the

scribed by Lord Cairns (*o*):—"A Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry* (*p*)) there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds against interference mentioned by Lord Justice Turner, 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case" (*q*). Under the Judicature Act, 1873 (*r*), stipulations in contracts, as to time or otherwise, which would not before the commencement of the Act have been deemed to be or to become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have theretofore received in equity. On an ordinary sale of land, it is not usual, in fixing the

exercise of this jurisdiction, the contract is construed in the same manner in equity as at law; Romilly, M. R., *Parkin v. Thorold*, 16 Beav. 66; Knight Bruce, L. J., *Roberts v. Berry*, 3 De G. M. & G. 290; Cairns, C., *Tilley v. Thomas*, L. R. 3 Ch. 67. But there can be no doubt that the Courts of Equity, in assuming a jurisdiction to enforce contracts which were broken at law by failure to observe a stipulation as to time, have practically interfered with the legal effect of the contract; and when one considers all the

delays that have been condoned in equity on the ground that time is not of the essence of a contract to sell land, it appears very questionable whether this doctrine has really conferred any benefit upon the community.

(*o*) In *Tilley v. Thomas*, L. R. 3 Ch. 61, 67.

(*p*) 3 De G. M. & G. 284, 291.

(*q*) See below, Chap. XII. § 1; Fry, Sp. Perf. §§ 1075-1091, pp. 491-8.

(*r*) Stat. 36 & 37 Vict. c. 66, s. 25 (7), amended by 38 & 39 Vict. c. 77, s. 10.

date of completion, expressly to make time of the essence of the contract.

Effect of fixing a day for completion without further stipulation.

When a day is fixed for the completion of the contract, without further special stipulation, the purchaser becomes entitled to the rents and profits and liable to discharge the outgoings as from that day, the vendor taking the profits and discharging the outgoings up to that day (*s*). And if the purchase be not completed on that day, and the delay be attributable to the purchaser, he is bound to pay interest on the purchase-money as from that day, whether he have entered into possession or not. But if the delay be attributable to the vendor, the purchaser is chargeable with interest (and consequently entitled to the profits and liable to the outgoings) only from the time when he either actually took or might safely have taken possession, the latter time being when a good title has been shown and verified (*t*). The purchaser may, however, discharge himself from the liability to pay interest, where the delay is attributable to the vendor's and not his own fault, by appropriating his money to the purchase in manner before explained (*u*). But, as we shall see, these matters and especially the payment of interest are usually provided for by special stipulation in formal contracts.

Fixtures or timber to be taken at a valuation.

4. If it be intended that the fixtures or timber or other trees upon the property sold shall be paid for at a valuation in addition to the sum agreed on as the price of the land, a special stipulation to that effect must form part of the contract of sale: otherwise the purchaser will be entitled to have the fixtures and trees,

(*s*) Sug. V. & P. 627; above, pp. 49, 50.

(*t*) *Pineke v. Curteis*, 4 Bro. C. C. 329, 333, n.; Leach, V.-C., *Esdaile v. Stephenson*, 1 S. & S.

122, 123; *Jones v. Mudd*, 4 Russ. 118; Sug. V. & P. 627 *sq.*; 2 Dart, V. & P. 627, 628, 5th ed.; 708, 709, 6th ed.; 650, 651, 7th ed.
(*u*) Above, p. 51.

as passing with the land, without extra payment (*x*). Such a stipulation is very commonly made, and the mode of valuation is usually specified; for instance, by two valuers to be appointed one by either party, or an umpire to be appointed by the valuers. But an agreement to sell property at a price to be ascertained by valuation made in a particular way does not result in an enforceable contract if that way be not pursued; for if the parties agree that the price is to be fixed by A., and A. do not fix it, the price is not reduced to the required certainty (*y*); and the Court will not, as a rule, provide other means of fixing the price, for that would be holding the parties bound by a contract different from that which they made (*z*). It is therefore proper to stipulate, after providing that fixtures or timber shall be taken at a valuation to be made in a particular manner, that failing such valuation they shall be paid for at a fair valuation or at their fair value. In such case, the Court will, it seems, direct a reference, if necessary, to ascertain the price (*a*).

5. It is usual to specify the instrument of disposition with which the title shall commence, especially if it be intended to confine the time, for which title is to be shown, within a shorter limit than the period fixed by law (*b*). No such stipulation is necessary if the vendor propose to deliver an abstract commencing with a good root of title (*c*) and extending over the whole period, for which title can by law be required to be shown. But if it be desired effectually to limit the purchaser's

Commence-
ment of title.

(*x*) *Colegrave v. Dias Santos*, 2 B. & C. 76.

(*y*) See above, p. 4.

(*z*) *Milnes v. Gery*, 14 Ves. 400; *Blundell v. Brettargh*, 17 Ves. 232; *Collins v. Collins*, 26 Beav. 306; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Fry, Sp. Perf.* §§ 354-367, pp. 161-7.

(*a*) See above, p. 4, n. [m]; *Sug. V. & P.* 287, 288; 1 *Dart, V. & P.* 221-3, 5th ed.: 257-9, 6th ed.: 242-4, 7th ed.: 1 *Davidson, Prec. Conv.* 522, 523. 607, 608, 4th ed.: 433, 513, 519, 5th ed.

(*b*) See above, p. 33.

(*c*) Above, pp. 41, 42.

rights, as defined by law, in the matter either of the time for which he may require title to be shown or of the nature of the instrument with which the title is to commence, a fair and explicit stipulation to the effect desired must be made (*d*).

Limiting time
for making
requisitions
on title.

6. It is usual to provide that the purchaser's requisitions on or objections to the title, or anything else connected with the sale, shall be sent to the vendor's solicitors within a limited time (as twenty-one days) after the delivery of the abstract of title, that in this respect time shall be of the essence of the contract (*e*), and that in default of or subject only to any such requisitions and objections so made the purchaser shall be taken to have accepted the title (*f*). And it is sometimes stipulated that any replies to the vendor's answers to the requisitions must be made within a specified time (*g*). Where such stipulations are made, it is not desirable, in the vendor's interest, to provide that the abstract shall be delivered within a specified time; as if he should fail to deliver it within the period appointed, the condition limiting the time, within which the purchaser is to make his requisitions, will fail of effect (*h*). It is further held with regard to such stipulations that the time thereby limited only begins to run from the delivery of a perfect abstract, that is, as perfect an abstract as the vendor is able to furnish at the time of delivery, although it may not show a complete title (*i*). Hence it is sometimes provided in conditions of sale

(*d*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*e*) See above, p. 58.

(*f*) 1 Davidson, *Prec. Conv.* 539, 614, 4th ed.; 449, 5th ed.; 1 Key & Elphinstone, *Prec. Conv.* 265, 4th ed.; 253, 8th ed.

(*g*) 1 Davidson, *Prec. Conv.* 521-2, 5th ed.; 1 Key & Elphinstone, *Prec. Conv.* 265, 4th ed.; 253, 254, 8th ed.

(*h*) *Upperton v. Nickolson*, L. R.

6 Ch. 436; 1 Dart, V. & P. 125, 5th ed.; 141, 6th ed.; 137, 138, 7th ed.

(*i*) *Hobson v. Bell*, 2 Beav. 17; *Morley v. Cook*, 2 Hare, 111; *Blackburn v. Smith*, 2 Ex. 789; *Gray v. Fowler*, L. R. 8 Ex. 249, 279; *Sug. V. & P.* 21; 1 Dart, V. & P. 126. 161, 162, 281, 5th ed.; 142, 184, 321, 6th ed.; 138, 174, 317, 7th ed.

that, for the purpose of any requisition or objection, the abstract shall be deemed perfect, if it supply the information suggesting the same, although otherwise defective. Such a stipulation is sanctioned by the practice of eminent conveyancers: but it has never been decided how far it is efficacious; and as regards the enforcement of specific performance its operation would appear to be very limited (*k*). The stipulation, that in default of requisitions or objections made within the time limited, the purchaser shall be taken to have accepted the title, does not bind him to take the property sold, if on the face of the abstract the vendor show no title at all to convey the same, even though this objection were not taken within the time appointed (*l*).

As we have seen (*m*), in the absence of any stipulation as to time, the vendor is bound to deliver the abstract within a reasonable time after the contract, and the purchaser is bound to make his objections, if any, to the title within a reasonable time after the delivery of the abstract; and if the latter make undue delay in examining or accepting the title, he may lose his right to enforce the specific performance of the contract (*n*). And retainer of the abstract for a long time, without making any requisitions, may amount to an acceptance of the title (*o*). In case of unreasonable delay on the purchaser's part, the vendor may send him a notice requiring him to accept or reject the title within a definite period (which must be a *reasonable* space of time as from the date of the notice), on pain of the

(*k*) See 1 Dart. V. & P. 126, 5th ed.; 142, 6th ed.; 138, 7th ed.; 1 Davidson, Prec. Conv. 540, 4th ed.; 450, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.; 254, 8th ed.; above, p. 38.

(*l*) *Went v. Stallibrass*, L. R. 8 Ex. 175; *Re Tanqueray Wil-*

laume and Landau, 20 Ch. D. 465, 473, 474; see below, Chap. V.

(*m*) Above, p. 48.

(*n*) *Spurrier v. Hancock*, 4 Ves. 667; Fry, Sp. Perf. § 1103, p. 503.

(*o*) Romilly, M. R., *Pepp v. Wisdom*, 16 Beav. 239, 244, 245; Fry, Sp. Perf. § 1351, p. 601.

Purchaser
should ask
for abstract.

vendor's putting an end to the contract; and if the purchaser fail to comply with such a notice, he will lose his right to enforce specific performance of the contract, and the vendor will be at liberty to rescind the contract or to sue upon it as broken (*p*). What is a reasonable time is a question of fact to be determined with regard to the circumstances of each particular case. If the vendor delay in sending the abstract of title, the purchaser should ask for it; if he fail to do this, he will be considered to have waived the delay, and will be precluded from asserting the non-delivery of the abstract within the appointed time or a reasonable time, as the case may be, to be a breach of contract by the vendor (*q*).

Reservation
to vendor of
right to
rescind the
contract.

7. The vendor generally reserves the right to rescind the contract if the purchaser shall insist on any requisition or objection which he shall be unable or unwilling to remove or comply with (*r*). In the absence of such a stipulation, neither party is at liberty to recede from the agreement without the consent of the other; this is of the very essence of contract. A right so reserved to rescind the contract must be exercised reasonably and in good faith, and not arbitrarily or capriciously (*s*): but if this limitation be observed, the present tendency of the Courts is not otherwise to interfere with the effect of such a condition by enforcing specific performance

(*p*) *Taylor v. Brown*, 2 Beav. 180, 183; *Walker v. Jeffreys*, 1 Hare, 341, 348; *Sug. V. & P.* 268, 269; *Fry, Sp. Perf.* §§ 1092 sq. pp. 499 sq.; *Compton v. Bagley*, 1892, 1 Ch. 313; above, pp. 36, 49.

(*q*) *Sug. V. & P.* 260, 261; 1 *Dart, V. & P.* 304, 305, 5th ed.; 346, 347, 6th ed.; 341, 342, 7th ed.

(*r*) This has long been usual; *Falkner v. Equitable Reversionary Co.*, 4 Drew. 352; *Juridical Socy. Papers*, ii. 590; 1 *Davidson, Prec. Conv.* 564, 4th ed.

(*s*) *Re Dames and Wood*, 29 Ch. D. 626; *Re Glenton and Saunders to Haden*, 53 L. T. N. S. 434; *Re Terry and White's Contract*, 32 Ch. D. 14; *Re Starr Bowkett Bdg. Socy. and Sibum's Contract*, 42 Ch. D. 375; *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458; *Quinion v. Horne*, 1906, 1 Ch. 596; see *Greaves v. Wilson*, 25 Beav. 290; *Bowman v. Hyland*, 8 Ch. D. 588; *Smith v. Wallace*, 1895, 1 Ch. 385; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; *Holliwell v. Seacombe*, ib. 426; below, Chap. V.

against a vendor who has availed himself of the letter of a stipulation entitling him to rescind. The condition is now very frequently framed in such a way as to give the purchaser the opportunity of withdrawing the requisition, with which the vendor cannot or will not comply (*t*); and this certainly appears to be the fair and proper course to take.

8. The purchaser's right to require evidence of the identity of the property sold with that described in the title-deeds (*u*) is usually limited by a stipulation, which precludes him from calling for other evidence of identity than is afforded by comparing the descriptions in the title-deeds with that contained in the contract (*x*). But this stipulation, in its common form, does not enable the vendor to enforce specific performance, without further evidence of identity, if such comparison afford no evidence that the property sold corresponds with that or part of that described in the deeds (*y*). Evidence of identity.

9. It is usually provided that errors of description shall not annul the sale, and either that no compensation or that reasonable compensation shall be allowed therefor (*z*). The better opinion is that an agreement allowing no compensation for errors of description applies to all errors, both great and small, so as to preclude the purchaser from requiring (as otherwise he might require (*a*)) specific performance of the contract with compensation: but it is held that the *vendor* is not thereby enabled to force upon the purchaser a property which Errors of description: compensation.

(*t*) 1 Key & Elphinstone, Prec. Conv. 266, 4th ed.; 255, 8th ed.

(*u*) Above, pp. 33, 43.

(*x*) 1 Davidson, Prec. Conv. 610, and n., 4th ed.; 520, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 262, 5th ed.; 250, 8th ed.

(*y*) *Flower v. Hartopp*, 6 Beav. 476; *Curling v. Austin*, 2 Dr. &

Sm. 129; and see Sug. V. & P. 26; 1 Dart, V. & P. 153, 154, 5th ed.; 174, 175, 6th ed.; 170, 7th ed.

(*z*) 1 Davidson, Prec. Conv. 559, 4th ed.; 464, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 267, 268, 4th ed.; 255, 256, 8th ed.

(*a*) See above, pp. 43, 44.

has been substantially misdescribed (*b*). An express contract to make compensation for errors of description does not appear to add or subtract anything to or from the purchaser's ordinary right to enforce specific performance of the contract with compensation (*c*): but it gives him the right, which he would not otherwise possess (*d*), to recover compensation for an error innocently made by the vendor but not discovered until after the completion of the contract (*e*). The vendor cannot, by reason of a condition to allow compensation, oblige the purchaser to take a property substantially different from that sold (*f*); but such a condition may cover a considerable deficiency in quantity even when the vendor is seeking to enforce the contract, if the Court be satisfied that, substantially, the purchaser will get the sort of property he contracted to buy (*g*). It is considered that a condition precluding any right to compensation is, on the whole, more advantageous to the vendor (*h*). Where a condition for giving compensation is made on a sale by auction, it is usual to provide that compensation shall be allowed on either side, so that the vendor may take advantage of it as well as the purchaser (*i*); and it is desirable to stipulate that it shall apply only to errors of description pointed out before completion (*k*).

Conveyance. 10. The execution of the conveyance by the vendor

(*b*) *Nicoll v. Chambers*, 11 C. B. 996; *Cordingley v. Cheeseborough*, 4 De G. F. & J. 379; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Re Terry and White's Contract*, 32 Ch. D. 14; *Dart, V. & P.* 740, 6th ed.; 680, 7th ed.; *Jacobs v. Revell*, 1900, 2 Ch. 858; see below, Chap. XII. § 4.

(*c*) *Dart, V. & P.* 741, 6th ed.; 681, 7th ed.; above, pp. 43-45; see below, Chap. XII. § 4.

(*d*) *Jolliffe v. Baker*, 11 Q. B. D. 255.

(*e*) *Patmer v. Johnson*, 13 Q. B.

D. 351.

(*f*) *Flight v. Booth*, 1 Bing. N. C. 370; 4 L. J. N. S. C. P. 66; see below, Chap. XII. § 4.

(*g*) *Re Fawcett and Holmes*, 42 Ch. D. 150.

(*h*) 1 *Davidson, Prec. Conv.* 468, 5th ed.

(*i*) See *Leslie v. Thompson*, 9 Hare, 268; below, Chap. XII. § 4.

(*k*) 1 *Davidson, Prec. Conv.* 562, 611, n. (*t*), 4th ed.; 467, 520, n. (*s*), 5th ed.; 1 *Key & Elph. Prec. Conv.* 267, 268, 4th ed.; 255, 256, 8th ed.

and the payment of the balance of the price by the purchaser on the day fixed for completion are usually the subjects of express provision; and it is generally stipulated that the purchaser shall bear the expense of any assurance or act necessary for getting in or releasing any outstanding estate or interest or perfecting the vendor's title (*l*); and it is sometimes declared that the purchaser shall bear the expense of the concurrence in the conveyance of all necessary parties other than the vendor (*m*).

11. It is usual to provide expressly that the vendor shall be entitled to possession or receipt of the rents and profits and liable to discharge the outgoings up to the day fixed for completion, and the purchaser afterwards; and that the rents and outgoings shall, if necessary, be apportioned for this purpose (*n*).

Apportionment of rents and outgoings.

12. It is usually stipulated that the purchaser shall pay interest at a specified rate on his unpaid purchase-money, if from any cause whatever the purchase be not completed on the day fixed for completion (*o*). If the purchaser bind himself to pay interest by an express stipulation in terms like these, he must pay interest in case of delay in completion, notwithstanding that the delay be attributable to the state of the title or otherwise to the vendor; and he will not be relieved from this obligation unless the delay be caused by the vendor's vexatious conduct, dealing in bad faith or gross negligence (*p*). Nor can he, according to the better opinion,

Interest in case of delay in completion.

(*l*) See above, p. 47: 1 Davidson, Prec. Conv. 570, 612, and n., 4th ed.; 1 Key & Elphinstone, Prec. Conv. 263, 4th ed.; 251, 8th ed.

(*m*) See above, p. 47.

(*n*) See above, pp. 49, 50; 1 Davidson, Prec. Conv. 613, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 259, 4th ed.; 247, 8th ed.

(*o*) See above, p. 50; 1 Davidson, Prec. Conv. 576, 613, 4th

ed.: 483, 522, 5th ed.

(*p*) *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 529; *Bannerman v. Clarke*, 3 Drew. 632; *Vickers v. Hand*, 26 Beav. 630; *Williams v. Glenton*, L. R. 1 Ch. 200; Sug. V. & P. 633-7; Dart, V. & P. 128, 635, 639, 5th ed.; 144, 719, 723, 6th ed.; 140, 661, 664, 7th ed.; and see *Re Bayley-Worthington & Cohen's Contract*, 1909, 1 Ch. 648, 654.

discharge himself from his liability to pay interest by appropriating his money to the purchase (*q*). Sometimes the contract is so worded as to bind the purchaser to pay interest in case of delay in completion arising from any cause whatever *other than the wilful default of the vendor*; and in such case the purchaser must pay interest unless the vendor were in wilful default, and such default were the effective cause of the delay (*r*). In this form the stipulation has been fruitful of litigation, with the result that little else has been clearly established than the futility pointed out by Lord Bowen of attempting a precise definition of the meaning of "wilful default" in such contracts (*s*), and the question, what conduct amounts to wilful default, can only be solved by consideration of the circumstances of each particular case (*t*).

Right to re-sell.

13. In conditions of sale by auction the vendor usually reserves the right to re-sell the property, if

(*q*) *Re Riley to Streatfield*, 34 Ch. D. 386.

(*r*) See *Re Mayor of London and Tubbs' Contract and Bennett v. Stone*, cited below.

(*s*) Default is said to mean not doing what is reasonable in the circumstances; wilful to imply nothing blameable, but merely the result of the spontaneous action of the will; Bowen, L. J., 31 Ch. D. 174, 175; "moral delinquency, intentional delay, wilful obstruction on the part of a vendor may be all absent, and yet there may be wilful default"; C. A. 1893, 3 Ch. 281.

(*t*) See *Re Young and Harston's Contract*, 31 Ch. D. 168, where it was held wilful default for the vendor to go abroad two days before the day fixed for completion; *Re Hetting and Merton's Contract*, 1893, 3 Ch. 269, where a mortgagee was abroad and the vendor relied on a power of attorney from him, which was held insufficient—this was considered wilful default; *Re Mayor of London and Tubbs' Contract*,

1894, 2 Ch. 524, where the vendors, having omitted to examine their title, misdescribed it in the contract—this was considered by Lindley and Lopes, L. JJ., not to be wilful default, *diss.* Kay, L. J.; *Re Wilsons and Stevens' Contract*, 1894, 3 Ch. 546, where it was held wilful default for a vendor of copyholds not to have procured certain admissions necessary to enable him to convey the legal estate; *Re Strafford and Maples*, 1896, 1 Ch. 235, where Kekewich, J., held it wilful default for a vendor not to have procured the concurrence of necessary parties to the conveyance; *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211; *North v. Percival*, 1898, 2 Ch. 128; *Bennett v. Stone*, 1902, 1 Ch. 226; 1903, 1 Ch. 509, where four judges were exactly divided in opinion whether it was wilful default for a vendor to insist in good faith upon an unreasonable contention as to the form of the conveyance,

the purchaser fail to comply with the conditions, and to recover from the purchaser any deficiency in price occurring on the re-sale. But such a stipulation is not commonly inserted in contracts of private sale. A re-sale under such a condition operates as a rescission of the original contract. The vendor is therefore entitled to retain for his own benefit any excess over the original contract price which may be realised on the re-sale (*u*).

It is not the practice, in settling conditions of sale, to stipulate expressly that the vendor shall show a good title, or verify the title by the production of the proper evidence, or produce a property identical with that agreed to be sold, or deliver over the title deeds on completion, or that the purchaser shall accept the title when proved (*x*). All these terms of the contract (*y*) are left to be implied therein by law. And it is also the present practice to leave to implication those provisions which are incorporated in contracts for the sale of land, in the absence of an expressed intention to the contrary, by the Vendor and Purchaser Act, 1874 (*z*), and the Conveyancing Act of 1881 (*a*), unless it be desired to make more stringent or other stipulations than those so implied by statute. Thus, in respect of making recitals in instruments twenty years old *prima facie* evidence (*b*), barring the production of and inquiries as to the title earlier than the date fixed for commencement of the title (*c*), providing for the expense of the production of title deeds not in the vendor's possession, and of the procurement and production of any evidence of title not in the vendor's

Stipulations left to be implied on sales by auction.

(*u*) *Ex parte Hunter*, 6 Ves. 94; *Lamond v. Duceall*, 9 Q. B. 1030; Sug. V. & P. 39; above, p. 54, n. (*f*).

(*x*) See 1 Davidson, Prec. Conv. 607 *sq.*, 4th ed.; 518 *sq.*, 5th ed.; 1 Key & Elph. Prec. Conv. 257 *sq.*, 4th ed.; 245 *sq.*, 8th ed.

(*y*) Above, pp. 32-35, 41-48.

(*z*) Stat. 37 & 38 Vict. c. 78, ss. 1, 2.

(*a*) Stat. 44 & 45 Vict. c. 41, s. 3.

(*b*) Above, p. 42.

(*c*) Above, pp. 42, 43.

possession (*d*), and stipulating for the retention by the vendor of title deeds relating to other land of his, and for his giving a statutory acknowledgment and undertaking for the production and safe custody thereof (*e*), the respective rights and duties of the parties are very often not expressly defined in conditions of sale, but left to be regulated by statute (*f*).

Conditions of sale by auction of freeholds in one lot.

The following is a simple form of conditions of sale by auction of freeholds in one lot. They are intended to be annexed to particulars of sale containing the description of the property offered. Great care should always be exercised in framing the particulars of sale in consequence of the vendor's obligation to produce, in fulfilment of the contract, a property corresponding exactly with that which he has described therein (*g*); and every precaution should be taken to ascertain that the land described in the particulars is not in point of quantity, tenure, estate, or in any other respect more extensive than or different from that which the vendor is able or intends to convey in performance of the agreement (*h*).

Bidding; right to bid reserved.

1. No person shall advance less than *l.* at a bidding, and no bidding shall be retracted (*i*). There will be a reserve price; and the vendor reserves the right to bid in person or by his agents as often as he or they may please (*k*). Subject to the rights so reserved to the vendor, the highest bidder shall be the purchaser. If any dispute shall arise respecting a bidding, the property shall be put up again and resold.

(*d*) Above, p. 45.

(*e*) Above, pp. 47, 48.

(*f*) See 1 Davidson, Prec. Conv. 518 *sq.*, 5th ed.; 1 Key & Elph. Prec. Conv. 252 *sq.*, 4th ed.; 237 *sq.*, 8th ed.

(*g*) Above, pp. 33, 43, 65.

(*h*) See, as to the consequences

of misdescription or misrepresentation in the particulars of sale, the cases cited above, pp. 33, 43-45, 65, 66, and below, Chaps. XII. § 4, XIII. § 1, XIV. § 1.

(*i*) See above, pp. 20, 57.

(*k*) See above, pp. 22, 23, 56, 57.

2. The purchaser shall immediately after the sale pay a deposit of 10*l.* per cent. of his purchase-money into the hands of [*the auctioneer or the vendor's solicitors*] and sign the subjoined agreement (*l*). Deposit; contract to be signed.

3. The fixtures, timber and other trees, tellers, pollards, saplings and underwood upon the property, down to the value of 1*s.* per stick, shall be paid for by the purchaser at a valuation to be made as hereinafter provided, or failing such valuation, at their fair value (*m*). The valuation shall be made by two valuers to be appointed one by the vendor and the other by the purchaser, or by an umpire to be appointed by the valuers, or if either the vendor or the purchaser shall refuse or neglect to appoint a valuer or to notify his appointment of a valuer to the other party in writing within seven days after being requested by the other party to do so, or if the valuer appointed by either party shall refuse or neglect to act for seven days after receiving notice in writing from the other party requiring him to proceed with the valuation, then by the other party's valuer alone, provided that his appointment shall have been duly notified in writing to the opposite party (*n*). Fixtures and timber to be paid for at a valuation.

4. The title shall commence with [*a deed or other instrument of such a date, the nature of which must be accurately set out* (*o*). *Any special conditions as to title, which may be necessary, may be inserted here*]. Commencement of title.

5. The purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract, particulars or conditions to Time limited for making requisitions on title, &c.

(*l*) See above, pp. 26, 57.

(*m*) See above, p. 60. In many cases it would be sufficient to say "by two valuers, or their umpire, to be appointed in the usual way, or otherwise at their fair value": but this would not authorize one party's valuer, in case of the default of the other party or his valuer, to make a valuation binding on the other

party. That is a matter which must be expressly provided for, if desired. See *Bos v. Helsham*, L. R. 2 Ex. 72.

(*n*) The last words are inserted to remind the parties of the fact, that the appointment of a valuer is not completely made until it has been notified to the opposite party; *Tew v. Harris*, 11 Q. B. 7.

(*o*) See above, p. 62.

the office, No. —, — Street, — of Messrs. —, the vendor's solicitors, within twenty-one days from the day of the delivery of the abstract, and in this respect time shall be of the essence of the contract (*p*). In default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title.

Reservation
to vendor of
right to
rescind the
contract.

6. If the purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents or any other matter appearing on the abstract, particulars or conditions or connected with the sale, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such requisition or objection (*q*), to give to the purchaser or his solicitor notice in writing of his intention to rescind the contract for sale unless such requisition or objection be withdrawn; and if such notice be given and the requisition or objection be not withdrawn within ten days after the day on which the notice was sent, the contract shall without further notice be rescinded (*r*). The vendor shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

Identity.

7. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property, upon the evidence afforded by a comparison of the descriptions contained in the particulars of sale and in the muniments (*s*).

(*p*) See above, p. 62.

(*q*) These words will not enable the vendor to rescind after final judgment has been given against him in a proceeding for determining the validity of some objection

taken by the purchaser; *Re Arbib and Class's Contract*, 1891, 1 Ch. 601.

(*r*) See above, p. 64.

(*s*) See above, p. 65.

8. The property is believed, and shall be taken to be correctly described as to quantity and otherwise. The property is sold subject to all chief and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon, and to all leases, tenancies, and occupations, whether mentioned in the particulars of sale or not; and to all rights and claims of lessees, tenants and occupiers (*t*). If any error, misstatement, or omission be discovered in the particulars of sale, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof.

No compensation for errors of description.

9. The purchaser shall pay the remainder of his purchase-money, and the value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, on the — day of — next, at the office aforesaid of Messrs. — to the vendor or as he shall in writing or otherwise duly authorize. Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance of the property to the purchaser; but such assurance, and every other assurance and act (if any) which shall be required by the purchaser for getting in, surrendering, or releasing any outstanding estate, right, title, or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be prepared, made, and done, by and at the expense of the purchaser (*u*); and every such assurance

Completion.

(*t*) General words like these, which must of course be modified according to the nature of the property sold, are inserted to protect the vendor against rents, easements, or tenants' claims of which he may be unaware at the time of sale. They would not enable him to enforce specific performance of the contract subject to any rents, easements, or tenancies, which would be serious incumbrances and were known to the vendor, but not mentioned in the particulars: *Hogwood v. Mal-lison*, 25 Ch. D. 357; *Nottingham*

Brick & Tile Co. v. Butler, 16 Q. B. D. 778; 1 Dart, V. & P. 156, 5th ed.: 177. 6th ed.: 172. 7th ed.

(*u*) Words like these have been held to throw upon the purchaser the costs of the concurrence in the conveyance of the vendor's mortgagees; *Re Willett and Argenti*, 5 Times L. R. 476; but not the costs of deducing title to any outstanding estate; *Re Adams' Trustees and Frost's Contract*, 1907, 1 Ch. 695. But if it be intended that the purchaser shall bear the expense of the concurrence in the

shall be left at the office aforesaid not less than ten days before the said — day of — next.

Rents, out-
goings, &c.

10. The rents will be received, possession retained and the outgoings discharged by the vendor up to the said — day of — next. As from that day the outgoings shall be discharged, the rents received and possession taken by the purchaser. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition. If from any cause whatever the purchase shall not be completed on the said — day of — next, the purchaser shall pay interest on the remainder of his purchase-money and on the aforesaid value of the fixtures, timber and other trees, tellers, pollards, saplings and underwood, at the rate of — *l.* per cent. per annum, from that day until the purchase shall be completed; and shall not be entitled to any compensation for the vendor's delay or otherwise (*x*).

Interest.

Power of
resale.

11. If the purchaser shall fail to comply with the above conditions, his deposit shall thereupon be forfeited, and the vendor shall be at liberty to resell the property at such time, in such manner and subject to such conditions, as he shall think fit; and any deficiency in price which may happen on, and all expenses, which may attend the resale, shall immediately afterwards be paid by the defaulter to the vendor; and, in case of non-payment, shall be recoverable by the vendor as liquidated damages (*y*).

Memoran-
dum to be
indorsed on
the condi-
tions.

I [*insert name and description*] hereby acknowledge that on the sale by auction this — day of — of the property mentioned in the foregoing particulars I

conveyance of necessary parties other than the vendor, it is better to make an express stipulation to that effect; see above, pp. 47, 67. If the vendor has a clear title in himself it is, of course, un-

necessary, and it is simply depre-
ciatory to stipulate that the pur-
chaser shall bear the expense of
getting in any outstanding estate.

(*x*) See above, p. 67.

(*y*) See above, pp. 51-54, 68.

was the highest bidder and was declared the purchaser thereof subject to the foregoing conditions at the price of —*l.*, and that I have paid the sum of —*l.* by way of a deposit and in part payment of the said purchase-money to [*the auctioneer*] and I hereby agree to pay the remainder of the said purchase-money and complete the said purchase according to the aforesaid conditions.

As witness my hand this — day of —.

[*Purchaser.*]

As agent for Mr. [*insert vendor's name and description* (*z*)] the vendor, I ratify this sale and acknowledge the receipt of the said deposit of —*l.*

[*Auctioneer.*]

The above conditions are in common form ; but they are of course drawn exclusively in the vendor's interest. It is not found, however, that purchasers are deterred from bidding by such conditions, at all events, in London sales (*a*). In the provinces, lands are often sold subject to the common form conditions of the local law society ; and some of these conditions are far more favourable to purchasers than those set out above (*b*).

(*z*) See above, p. 5.

(*a*) This seems to have been the case during the latter half of the last century ; see 1 Davidson, *Prec. Conv.* 505, 506, 4th ed. ; *Juri-*

dical Society Papers, ii. 589 *sq.* Before this, the conditions of sale by auction were usually far less stringent ; see 2 *Sug. V. & P.* 1076, 11th ed.

(*b*) Thus under the common form conditions of sale of the Birmingham Law Society, the purchaser expressly contracts to pay interest at 5*l.* per cent. on delay in completion, but is allowed, if such delay shall arise from any cause other than his own neglect or default, to appropriate his money to the purchase by placing it to a deposit account in a bank and giving notice of such deposit, and is thenceforth chargeable only with the interest given on the deposit ; the expense of perfecting the vendor's title or of conveyance by necessary parties other than the vendor is left to fall on the vendor ; the vendor has to bear the cost of production of any documents, which are in the possession of a mortgagee, or other incumbrancer, or of a person obliged to produce them at the vendor's request ; the vendor is empowered to rescind only if he is unable or on the ground of expense unwilling to comply with some requisition ; and compensation is to be given for errors of description if pointed out before completion. The conditions of the Bristol, Liverpool and Manchester Law Societies are nearly as favourable to purchasers.

General
condition
on sale under
a trust for or
power of sale.

Besides the above conditions, it is usual, where the vendor is selling under a trust for or power of sale (*c*), to add the following stipulation (*d*) :—

“The vendor is a trustee (*e*) selling under a trust for (*f*) sale, and the purchaser shall not require the concurrence of the persons beneficially interested in the property sold or the purchase-money, and shall not be entitled to any other covenant than the statutory covenant by the vendor that he has not incumbered, or to any undertaking or covenant for safe custody of any document which the vendor is entitled to retain.”

The reason of this is that, though one who shows on the face of the contract that he sells as a trustee, cannot be called upon to give covenants for title, but can only be required to covenant that he personally has not incumbered (*g*), a trustee, who sells as apparent owner under a contract in which his fiduciary capacity is not disclosed, appears to undertake the duties regularly imposed on a vendor of land (*h*) to give covenants for title and an undertaking for safe custody of any deeds retained. And where, on a sale by a trustee, the purchase-money will belong to some person or persons being *sui juris* and absolutely entitled thereto, either entirely or in shares, it has been the practice of conveyancers, unless precluded by express stipulation, to require him or them to concur in the conveyance and give covenants for title to the property sold or their shares therein (*i*). A stipulation similar to that given above is usually made on sales by a mortgagee under his power of sale (*k*), precluding the purchaser from

Sale by
mortgagee
under his
power of sale.

(*c*) As to sales by trustees, see below, Chap. VIII. § 2.

(*d*) 1 Davidson, Prec. Conv. 612, 613, 4th ed.; 1 Key. & Elph. Prec. Conv. 264, 4th ed.; 252, 8th ed.

(*e*) Or an executor, or an administrator, as the case may require.

(*f*) Or *power of*, as the case may require.

(*g*) *Worley v. Frampton*, 5 Hare, 560; Sug. V. & P. 69, 575; below, Chap. XII. § 3.

(*h*) Above, pp. 46-48.

(*i*) See below, Chap. XII. § 3.

(*k*) See below, Chap. IX.

requiring the concurrence of the persons entitled to the equity of redemption (*l*).

A few words may be added here with regard to what are called special conditions of sale, which are conditions requiring the purchaser to accept a title shorter or otherwise less perfect than he would be entitled to demand under an open contract, or to take the property sold subject to some incumbrance, easement or right in favour of other persons. Such conditions, in order to be completely binding on the purchaser, must be framed with very great care. It is true that, at law, a purchaser may be bound by a contract to buy a property subject to some defect of title or otherwise, according to the plain meaning of the words used; and so may have no right to recover his deposit if he object to comply with the condition (*m*). But in equity a vendor will not be entitled to enforce the specific performance of such a contract unless he has acted in the greatest good faith. If therefore the special condition be in any way misleading, that is, if it do not fairly and explicitly call the purchaser's attention to the defect to which he is to submit, or if it contain any material misrepresentation however innocently made, as to a matter of fact, the Court will not oblige the purchaser specifically to perform the contract (*n*). And if the condition be obscurely or ambiguously expressed, it will be construed in favour of the purchaser (*o*). But if the facts of the case be honestly and clearly stated, the condition will

Special conditions of sale.

(*l*) See above, p. 76, n. (*d*).

(*m*) *Best v. Hamand*, 12 Ch. D. 1; *Re Davis and Carey*, 40 Ch. D. 601, 607; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Scott v. Alvarez*, 1895, 2 Ch. 603; above, p. 38.

(*n*) *Re Banister, Broad v. Manton*, 12 Ch. D. 131; *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Nottingham Patent Brick & Tile*

Co. v. Butler, 16 Q. B. D. 778. As to fraudulent misrepresentation, see *Edwards v. M'Leay*, G. Coop. 308, 2 Sw. 287; *Hart v. Swaine*, 7 Ch. D. 42; *Juliffe v. Baker*, 11 Q. B. D. 255; below, Chap. XIV. § 1.

(*o*) *Symons v. James*, 1 Y. & C. C. C. 487, 490; *Seaton v. Mapp*, 2 Coll. 556, 562; *Rhodes v. Ibbetson*, 4 De G. M. & G. 787.

be binding, although the legal effect of the facts be not stated (*p*). A very common instance of a special condition of sale is that requiring a purchaser of freeholds to accept a title commencing with some instrument less than forty years old; in such cases, as we have seen, the vendor cannot enforce specific performance according to the letter of the contract, if this instrument be not a good root of title (*q*). So if it be intended that the purchaser shall take the land subject to covenants restrictive of its user, it must be clearly indicated that he is to buy subject to an incumbrance of this nature (*r*). The construction of special conditions of sale is the same, whether they be made on a sale by public auction, or contained in a contract of private sale (*s*).

Other stipulations usually made in certain particular cases.

Insufficiently stamped documents executed before 17th May, 1888.

It may also be convenient, in discussing the subject of conditions of sale by auction, to point out various other stipulations in the vendor's favour, which are usually made in certain particular cases. Thus, whenever it is known or apprehended that any document of title executed before or on the 16th of May, 1888, is or may be unstamped or insufficiently stamped (*t*), it is provided that no objection shall be taken on that account, and that if the purchaser shall require any such document to be stamped or further stamped, such stamping shall be effected by him and at his expense (*u*). So, on the sale of land in Middlesex or Yorkshire, or of

(*p*) *Smith v. Watts*, 4 Drew. 338; *Re Sandbach and Edmondson's Contract*, 1891, 1 Ch. 99; *Blaiberg v. Keeves*, 1906, 2 Ch. 175; compare *Williams v. Wood*, 16 W. R. 1005.

(*q*) *Re Marsh and Earl Granville*, 24 Ch. D. 11; above, pp. 41, 61.

(*r*) See *Phillips v. Caldwellough*, L. R. 4 Q. B. 159; *Nottingham Patent Brick and Tile Co. v. Butler*, 16 Q. B. D. 778.

(*s*) *Rhodes v. Ibbetson*, 4 De G.

M. & G. 787, 793.

(*t*) See above, p. 45. Such a condition, if made as to documents executed after that day, is void by stat. 54 & 55 Vict. c. 39, s. 117, re-enacting 51 & 52 Vict. c. 8, s. 20; see below, Chap. IV. § 3.

(*u*) 1 Key & Elph. Prec. Conv. 255, 263, 4th ed.; 240, 251, 8th ed.; Davidson's Concise Precedents, 115, 18th ed.

unregistered land in the county of London (*x*), it is usual to stipulate that no objection shall be taken or requisition made on account of any document which should or might have been registered in the county register not being so registered (*y*).

Unregistered documents on sale of land in Middlesex or Yorkshire or of unregistered land in London.

Again, whenever leasehold land is sold, it is advisable to state that the property is sold subject to the rent, covenants, conditions, and all liabilities under the lease, whereby the same is held; to give to intending purchasers the opportunity of inspecting the lease at the office of the vendor's solicitors within a limited time before the sale; and to provide that the purchaser, whether he shall avail himself of this opportunity of inspection or not, shall be deemed to have full notice of the contents of the lease, whether of a usual character or not (*z*). And it is also desirable to stipulate expressly that the production of a receipt for the last payment of rent accrued due under the lease prior to completion shall be accepted as conclusive evidence that all the covenants and conditions in the lease have been duly performed and observed; and that it shall be assumed without proof that the person or persons giving such receipt, though not the original lessor, are the reversioner or reversioners expectant on such lease or his or their authorized agents (*a*). Where the lease contains a covenant to repair, and the property is out of repair, an opportunity of inspecting the property should (if possible) be given to intending purchasers, and it should be provided that they shall be deemed to buy with full notice of the actual state and condition of the property, as to repair or otherwise, *and shall take the same as*

Sale of leaseholds.

Purchaser to have an opportunity of inspecting the lease, and to be deemed to buy with full notice of its contents.

Production of last receipt for rent to be conclusive evidence of performance of covenants.

Person giving such receipt to be assumed to be reversioner.

Purchaser to buy with notice of the state of repair and take property out of repair as it is.

(*x*) See below, Chap. X. § 3.

(*y*) 1 Key & Elph. Prec. Conv. 263, 4th ed.; 251, 8th ed.; Davidson's Concise Precedents, 115, 18th ed.

(*z*) 1 Key & Elph. Prec. Conv. 269, 270, 4th ed.; 259, n. (*e*),

265, 8th ed.; see below, Chap. X. § 2.

(*a*) 1 Key & Elph. Prec. Conv. 254, 270, 4th ed.; 239, 266, 8th ed.; Davidson, Prec. Conv. 115, 18th ed.; see below, Chap. X. § 2.

Purchaser to give the usual covenant of indemnity.

And execute at his own expense a duplicate of the conveyance.

Sale of land held by underlease.

it is (b). It is also common (though not necessary *(c)*) to stipulate expressly that the purchaser shall covenant in the deed of conveyance to pay, perform and observe, and to indemnify the vendor against the rent and covenants of the lease; and it is desirable further to provide (what is a modification of the rule of law *(d)*) that for this purpose the purchaser shall, at his own expense, procure to be prepared and stamped, and execute and deliver to the vendor a duplicate of the deed of conveyance *(e)*.

Where the land to be sold is held by underlease, it should be stated to be so held, and must not be represented as being held by lease (which is intended to mean a lease from the freeholder) *(f)*; the property should be sold subject to the rent and covenants, &c. of the lease, under which it is held, *and of every superior lease*; and the stipulations above recommended on the sale of leaseholds should be adapted to the case, provision being made that production of the receipt for the rent last due before completion under the lease, whereby the property is held, shall be conclusive evidence of the

(b) See below, Chap. X. § 2; 1 Key & Elph. Prec. Conv. 259, n. *(e)*, 8th ed.

(c) See below, Chap. XII. § 3.

(d) It is thought that, in the absence of special stipulation, a vendor of leaseholds would be entitled to require a duplicate of the conveyance to be executed and handed over to him, but would have to bear the expense of engrossing and stamping it. The rule appears to be that any party to a contract for sale of land, to whom any benefit is to be assured by the conveyance, is as regards that benefit a purchaser, and is therefore entitled to have a duplicate of the deed of conveyance to keep as evidence of his title, but must therefore him-

self bear any extra expense occasioned by such conveyance to himself; see above, p. 46; Litt. s. 370; Co. Litt. 2-9a and note. This rule seems to be exemplified in the case of the grant of a lease, when the lessor has to bear the expense of the counterpart: *Re Negus*, 1895, 1 Ch. 73, 81; *Re Gray*, 1901, 1 Ch. 239, 243, 244; *Re Cohen and Cohen*, 1905, 1 Ch. 345, 350. And it is thought that it applies in every case, in which a purchaser of land is bound to enter into a covenant to indemnify the vendor; see below, Chap. XII. § 3.

(e) 1 Key & Elph. Prec. Conv. 266, 267, 8th ed.

(f) See below, Chap. IV. § 1; Chap. XII. § 2.

performance of all the covenants and conditions of that lease *and of every superior lease (g)*.

Where the property sold is subject, together with other property, to some rent (whether rent service, rent seck, or rent-charge), it is generally provided, in order to avoid the necessity of the concurrence of the owner of the rent, that the property is sold subject to such rent, and the purchaser shall bear some specified proportion thereof, but shall not require any legal apportionment thereof to be made (*h*); and the vendor agrees either to covenant to pay and to indemnify the purchaser against payment of the rest of the rent, or to grant to him by way of further indemnity a rent-charge in fee of an amount equal to the remainder of the rent to issue out of other lands belonging to the vendor (*i*). And where the land sold is subject, together with other land, to a lease reserving rent, it is usual to stipulate that the purchaser shall be entitled to some specified portion of the rent, but shall not require any legal apportionment of the rent to be made (*k*). Also in the case of the sale of any property, which is from its situation or condition liable to become subject to some charge or to give rise to some liability at the instance of some local authority under some Local Management or Improvement Act, or the Public Health Act, 1875 (*l*), or the Private Street Works Act, 1892 (*m*), as for the expenses of paving, sewerage, or lighting an adjoining street, or of complying with a "dangerous structure" notice (*n*), it is not unusual to make a special

Sale of land subject, together with other lands, to some rent.

Sale of land subject, together with other land, to a lease reserving rent.

Sale of property liable to become subject to some statutory charge at the instance of a local authority.

(g) 1 Key & Elph. Prec. Conv. 271, 4th ed.; 266, 8th ed.; Davidson's Concise Precedents, 115, 18th ed.

(h) As to the apportionment of such rents, see below, Chap. X. § 6.

(i) See below, Chap. XII. § 4; 1 Davidson, Prec. Conv. 544, 684 sq., 4th ed.; 451, 551 sq., 5th ed.;

1 Key & Elph. Prec. Conv. 337 sq., 4th ed.; 339 sq., 8th ed.

k See below, Chap. X. § 5; Chap. XII. § 4; 1 Davidson, Prec. Conv. 691, 4th ed.; 558, 5th ed.

(l) Stat. 38 & 39 Vict. c. 55, see ss. 41, 150, 257, and stat. 53 & 54 Vict. c. 59, s. 19.

(m) Stat. 55 & 56 Vict. c. 57.

(n) See below, Chap. XI. § 1.

stipulation with respect to the incidence of the charge or liability (*o*); and, of course, the stipulation most favourable to the vendor is to cast the burthen of payment on the purchaser, whether the notice or other event, which gave rise to the liability, were served or occurred before or after the sale (*p*).

Sale of land
by auction
in lots.

Where land is sold by auction in lots, stipulations similar to those set out and discussed above (*q*), are invariably made (where appropriate), but they are, of course, expressed to bind the purchaser of any lot. There are, however, certain matters for which special provision should be made on a sale of land in lots.

Custody of
title-deeds to
several lots.

Thus it is proper to provide that any documents forming part of the title to several lots shall be retained by the vendor until all those lots have been sold, whether at the auction immediately contemplated or some future sale, and shall then be delivered to the purchaser who shall then have bought the largest part in value of those

Sale of lease-
holds in lots.

lots (*r*). Where leasehold lands held under one lease at one entire rent are sold in lots, it is usual to stipulate that the purchaser of the largest part in value of those lots shall take an assignment of the lease and the purchasers of the other lots shall take underleases at specified rents from him or from the vendor (*s*). And on the sale in lots of freehold land subject to one entire rent (whether rent service, rent seck, or rent-charge), it

Sale in lots
of freeholds
subject to a
rent.

(*o*) As to the incidence of such charges in the absence of special stipulation, see cases cited above, p. 50, n. (*l*); below, Chap. V.; Chap. XI. § 1; Chap. XII. § 2. A special stipulation of this kind, casting the liability on the vendor or the purchaser according as the requirement or demand creating it is made before or after the sale, is contained in the common form conditions of sale of the Birmingham Law Society; and the Bristol,

Liverpool, and Manchester Law Societies' conditions of sale contain a stipulation throwing these expenses on the purchaser where the requirement is made after the sale.

(*p*) See the form of stipulation given in Appendix A, below.

(*q*) Pp. 70–75.

(*r*) See below, Chap. XII. § 3.

(*s*) See below, Chap. X. § 2 at end.

is commonly stipulated that all the purchasers shall buy subject to the rent and shall have no right to require it to be legally apportioned; but provisions are made for charging the rent, as between the purchasers, either entirely on one or in specified proportions on more or on all of the lots, and for granting new rent-charges to issue out of the lot or lots so to be charged in order to indemnify any purchaser against having to pay a greater proportion (if any) of the rent than is so agreed to be charged on the lot bought by him (*t*). When land is put up for sale in lots, as to which it is proposed that the purchasers shall enter into covenants restrictive of the user thereof, then unless the vendor be willing that any lots remaining on his hands unsold shall be subject to the same restrictions, care should be taken to stipulate that, as regards any lot or lots which shall not be sold, the vendor shall not stand in the purchaser's place so as to be bound by the covenants (*u*). According to the present law, on a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title has no right to more than one abstract of the common title, except at his own expense (*x*); so it is unnecessary to make any special stipulation to this effect (*y*). A form of conditions of sale by auction of freehold and leasehold land in lots, giving examples of all the stipulations discussed above (*z*), and containing special conditions as to the vendor's title, is given in the Appendix (*a*).

Sale of land in lots subject to restrictive covenants.

Purchaser of several lots entitled to one abstract only of the common title.

Having thus considered the conditions usually made on sales by auction, it remains to inquire what stipula-

Stipulations in formal contracts for private sale.

(*t*) See above, p. 81, n. (*i*).

(*u*) See below, Chap. X. § 12.

(*x*) Conveyancing Act, 1881, stat. 44 & 45 Viet. c. 41, s. 3 (7).

(*y*) Such a stipulation was usual before the year 1882: 1

Dart, V. & P. 126, 5th ed.; 1 Davidson, *Proc. Conv.* 526, 640, 4th ed.

z) P. 56 *sq.*

a) Appendix A, below.

tions are generally inserted in formal agreements for sale by private contract. The practice in this respect has undergone remarkable fluctuation. We find that down to the end of the first half of the last century vendors were apparently content to undertake by express stipulation the obligations which the law cast upon them in the case of an open contract; notwithstanding that those obligations, including the duty of proving a good sixty years' title at the vendor's expense, were far more onerous than they are at present (*b*). After this, a time of exceptional prosperity brought about a brisk market for the sale of land, and purchasers could be found who would agree, not only on sales by auction (*c*), but on private sales, to stipulations limiting the time for deducing title, giving the vendor the right to rescind in case of a disagreeable requisition, throwing upon the purchaser the expense of procuring all evidence of title not in the vendor's possession and even of the concurrence in the conveyance of all necessary parties other than the vendor, and binding the purchaser to pay interest on delay in completion "from any cause whatever" (*d*). Then legislation took place, entirely in vendors' favour; and not only was the time for deducing title limited to forty years on open contracts (*e*), but the expense of procuring all evidence of title not in the vendor's possession was thrown on the purchaser in the absence of stipulation to the contrary (*f*). By this time the sale of land subject to special stipulations drawn entirely in the vendor's interest had become so much a matter of course that conveyancers engaged in settling contracts for sale on

(*b*) See 1 Bythewood & Jarman, Prec. Conv. 3rd ed. by Sweet (1841), pp. 490, 500; Sug. V. & P. 52, 1076, 11th ed. (1846).

(*c*) Above, p. 75, n. (*a*).

(*d*) See Juridical Society Papers, ii. 589 sq.; Davidson, Prec.

Conv. vol. ii. pt. i. 1-20, 4th ed. (1877).

(*e*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 3 (6).

the purchaser's behalf had almost abandoned even the claim to protest (*g*). Recently, however, a change has again taken place. Judicial decisions upon the construction of the enactment making the purchaser pay for all evidence which the vendor has not, have shown that it may work most unfairly to the purchaser, who has been held liable to pay the expense of the production of title-deeds in the possession of the vendor's mortgagees (*h*), and of searching for a leading title-deed which was absent from the vendor's possession (*i*). It has also been shown that the contract to pay interest on delay in completion from any cause whatever (*k*) and the stipulation requiring the purchaser to pay the costs of getting in outstanding estates (*l*) may work great hardship on a purchaser. Owing to these decisions, it is thought that practitioners are again becoming sensible of the duties incumbent on them when acting for a purchaser; and when on private sales vendors propose the same stipulations as they would make on a sale by auction, it is no longer a matter of course that the purchaser's advisers shall receive the proposal with supine acquiescence. Of course bargaining about the conditions of sale is like bargaining about the price. The ultimate decision depends on the willingness of one party to give in rather than lose the contract. But a purchaser has such good reason for objecting, on a private sale, to the conditions usual on sales by auction that it appears foolish to agree to them without negotiation. He is likely to succeed in some, if not all of his contentions; and even where he finds himself reduced to the alternative of withdrawing his objection or abandoning the purchase, he will often have extracted

(*g*) See 1 Key & Elphinstone's Prec. Conv. 283, n., 2nd ed.; 348, n., 4th ed.; 316, n., 5th ed.

(*h*) *Re Willett and Argenti*, 5 Times L. R. 476.

(*i*) *Re Stuart, Olivant and Seaton's Contract*, 1896, 2 Ch. 328.

(*k*) See above, p. 67.

(*l*) *Re Willett and Argenti*, 5 Times L. R. 476.

valuable information showing why the vendor refuses to give way, and helping him materially in exercising his own judgment.

Vendor's
reasons for
not desiring
an open
contract.

The main reasons why a vendor does not usually desire to sign an open contract are these :—he wants to obtain a deposit as a guarantee for the due performance of the contract ; he probably does not want to make out the whole forty years' title as required by law ; he desires above all to be able to rescind if a too onerous requisition be made ; and he wants the time stipulation as to making requisitions (*m*) and the express contract to pay interest on delay from any cause whatever (*n*), in order to avoid the leisurely procedure sanctioned by the rule that time is not of the essence of the contract (*o*). But the purchaser has only one reason for avoiding an open contract, namely, the unfavourable position in which the law places him as regards the expenses of evidence not in the vendor's possession. In all other respects an open contract is decidedly advantageous to him ; he pays no deposit, can insist on a good forty years' title without fear that a necessary but unwelcome requisition will be met by a notice to rescind, can require the vendor to get in outstanding estates or incumbrances at his own expense, and need pay no interest on delay in completion caused by the state of the title or the vendor's fault (*p*). On the whole, it seems advisable for an intending purchaser always to offer, and if he can, to procure the signature of an open contract. If the vendor be anxious to sell and satisfied with the price proposed, such an offer will bring home to him the advantage of binding the purchaser definitely and at once instead of disputing over special stipulations, each of which gives the buyer an

(*m*) Above, p. 62.

(*n*) Above, p. 67.

(*o*) Above, p. 58.

(*p*) See above, pp. 26, 33, 41, 47, 50.

opportunity of retiring. And if the purchaser profess his willingness to sign an open contract from the first, he will occupy a favourable position for negotiating as to any special stipulations. I am willing, he may point out to the vendor, to buy under the conditions imposed by law; you wish to modify them. Be it so: but it is, to say the least, unfair that every special stipulation should be in your favour. If you expect to have the great advantages of receiving a deposit and being enabled to rescind on receiving an unwelcome requisition, advantages which you can only acquire by special stipulation, you must at least purchase them by relieving me from part of the expense now cast on me by law, and you must not expect me to contract to pay interest on delay caused by your fault.

In settling a private contract then, the object of the draftsman acting for the vendor will usually be to obtain the insertion of the stipulations made on sales by auction: while the duty of a conveyancer acting on the purchaser's behalf is to oppose such provisions in all points where they can be shown to be unreasonable. We will now go through the clauses in detail.

Points to be considered in settling a private contract.

The payment of a deposit is not an unreasonable requirement, and is usually demanded, unless the purchaser be a person of well-known solvency (*q*). Nor can such a requirement work unfairly to the purchaser, if the contract be in other respects an open contract; provided he be careful to stipulate for payment of the deposit to some responsible person as stakeholder, and not to the vendor himself or to his solicitor as his agent (*r*). But if it be proposed that the contract shall contain special stipulations as to title, a purchaser

Deposit.

(*q*) Davidson, *Prec. Conv.* vol. ii. pt. i. p. 4, 4th ed.

(*r*) See above, p. 23.

paying a deposit may find himself in this predicament, which is by no means uncommon :—the special condition may be considered in equity to be so unfairly drawn that the Court will not enforce specific performance at the vendor's suit without his complying with some requirement as to title, which is prohibited by the letter of the condition (*s*). The vendor may decline to do this; and the purchaser cannot force him to do it, because if the *purchaser* apply for specific performance, the vendor would not be bound to prove more than a good title according to the contract (*t*); and even if he failed to prove this, the purchaser would be obliged either to waive his objections to the title and pay the costs of the inquiry into title (*u*), or to submit to have his application dismissed without costs (*x*). And if, in such circumstances, the purchaser seek to recover his deposit, he will fail, because that is a matter depending solely on the effect of the contract at law. And the common law, not recognising the unfairness which in equity prevents the vendor from enforcing the contract specifically, will regard the purchaser repudiating the letter of the special condition as having broken the contract, and will not therefore aid him to recover the deposit (*y*). And if he complain of hardship, he will probably be told that he was a fool to buy land on special conditions as to title. These considerations ought to be present in the mind of a purchaser's adviser, when it is demanded that his client pay a deposit and yet submit to special conditions as to title; and he should endeavour, if he must

(*s*) Above, p. 38.

(*t*) *Re Banister, Broad v. Munton*, 12 Ch. D. 131, 145; *Lawrie v. Lees*, 14 Ch. D. 249; 7 App. Cas. 19.

(*u*) *Bennett v. Fowler*, 2 Beav. 302; Fry, Sp. Perf. § 1320, p. 590, 3rd ed.

(*x*) *Lewis v. Lozham*, 3 Mer. 429; *Malden v. Fyson*, 9 Beav.

347; Sug. V. & P. 646; 2 Dart, V. & P. 1129, 5th ed.; 1263, 6th ed.; 991, 7th ed. In such case the purchaser could not recover his own costs as damages at law; *Malden v. Fyson*, 11 Q. B. 292.

(*y*) *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 2 Ch. 603; see above, p. 38.

give in to the demand, to yield only at the price of some substantial concession to himself, as that the abstract shall be verified free of all expense to the purchaser.

It is a matter of course to fix a day for completion. Time for completion.
A time should be allowed within which it is reasonably likely that all things preliminary to completion will be done. Too often the day for completion appears to be fixed at hazard, or without any expectation that completion shall really then take place.

It is of course as necessary to stipulate expressly, Fixtures or timber at a valuation.
that fixtures or timber shall be taken at a valuation, on a private sale as on a sale by auction (z).

A purchaser should, as a rule, resist the insertion in a sale by private contract of any special stipulations limiting the vendor's obligations in respect of showing title, and should only accept such provisions on condition of concession in other matters to himself. Thus if it be proposed that the abstract commence with a deed less than forty years old, and that a deposit be paid, the purchaser should require the vendor to undertake expressly that the deed is a good root of title. This would, it is thought, save the purchaser from losing his deposit in circumstances such as those, which have just been discussed (a). And further concessions should certainly be demanded as the price of consent to any large curtailment of the time for which title is required to be shown by law; as that the vendor should bear the whole expense of verifying the abstract. Commencement of title.

It is quite proper to provide in a private contract for sending in the purchaser's requisitions or objections Limiting time for making requi-

(z) Above, p. 60.

(a) Above, p. 87.

sitions or
objections.

within a limited time, to be of the essence of the contract (*b*). But the purchaser should take care that a reasonable time is allowed for perusal of the abstract by his counsel; and he should stipulate that the abstract be delivered within a specified time (*c*).

Reservation
to vendor of
right to
rescind the
contract.

It is usual to reserve to the vendor the right to rescind, if unable or unwilling to comply with some requisition, on which the purchaser insists (*d*). This is a stipulation which it is generally essential for the vendor to make. But as it is no part of an open contract and is entirely one-sided, the purchaser ought to make its acceptance a ground of securing some advantage for himself. And if he admit it, he should stipulate that it be qualified by providing that the right of rescission should only arise if the vendor have some reasonable ground, as the expense, for declining to comply with the requisition (*e*). He should also take care that the terms of the stipulation give him the alternative of withdrawing the unwelcome requisition (*f*).

Expense of
verification of
the abstract.

The purchaser ought to try to obtain some relaxation of his obligation to bear the expense of procuring and producing all evidence of title, which is not in the vendor's possession (*g*). He should ask, according to the vendor's eagerness to sell and the modifications of the contract proposed on the vendor's behalf, that the vendor shall bear either (1) the whole expense of verifying the abstract, or (2) such expenses of the production for verification of the abstract and the examination by

(*b*) Above, p. 62.

(*c*) See above, p. 62.

(*d*) Davidson, *Prec. Conv.* vol. ii. pt. i. p. 4, 4th ed.; see above, p. 64.

(*e*) See 1 Key & Elphinstone, *Prec. Conv.* 266, n. (*b*), 4th ed.;

254, n. (*d*), 8th ed.; above, p. 64, n. (*s*); and as to the construction of a stipulation so framed, *Re Weston and Thomas's Contract*, 1907, 1 Ch. 244, 248.

(*f*) See above, pp. 65, 72.

(*g*) Above, pp. 33, 47.

the purchaser's solicitors of any documents, which the purchaser can require to be abstracted and which are in the possession of any other person than the vendor, as the vendor would be bound to pay if the said documents were in his own possession, or (3) the like expenses as to documents which can be required to be abstracted and are in the possession of a mortgagee or other incumbrancer. The last of these stipulations ought to be proposed on the purchaser's behalf on every treaty for a private sale (*h*).

The purchaser should object to any stipulation limiting his right to require evidence of identity (*i*), and should certainly not agree, without good reason shown, to any stipulation more stringent in this respect than the common-form condition on sale by auction (*k*).

Evidence of identity.

As we have seen (*l*), an express stipulation, that compensation shall be paid for errors of description, is more favourable to the purchaser than the terms of an open contract: whilst a condition, that no compensation shall be made for such errors, appears more advantageous to the vendor. The stipulation fairest to both parties appears to be that providing for compensation to be allowed by the vendor or the purchaser, as the case shall require, and not restricting the right of compensation to errors discovered before the completion of the sale (*m*).

Compensation for errors of description.

A purchaser should certainly strike out of a draft contract any provision throwing upon him the expense

Conveyance.

(*h*) Such a stipulation is contained in the common form conditions of sale by auction of the Bristol, Liverpool, and Newcastle-upon-Tyne Law Societies; and the Birmingham Law Society conditions are, as we have seen, even more favourable to the purchaser. Above, p. 75, n. (*b*).

(*i*) See Davidson, *Proc. Conv.*

vol. ii. pt. i. pp. 4, 13-16, 4th ed.

(*k*) See above, pp. 33, 65, 72.

(*l*) Above, p. 65.

(*m*) A condition of this kind is usually made on sales by order of the Court; 1 Davidson, *Proc. Conv.* 653, 663, 4th ed.; 587, 591, 5th ed.; R. S. C. 1883, App. L. No. 15, § 9; see above, p. 66.

of getting in any outstanding estate or perfecting the vendor's title, or of the concurrence in the conveyance of any necessary parties besides the vendor (*n*). In these respects he should stand out for the rights he would have under an open contract (*o*). This is only reasonable; and we have seen that, under the common form conditions of the Birmingham and other law societies, purchasers on sales by auction are not deprived of these rights (*p*).

Apportionment of rents and outgoings.

The same provision is made on a private sale for apportionment of the rents and outgoings as on a sale by auction (*q*).

Interest in case of delay in completion.

It is invariably asked that the purchaser shall expressly agree to pay interest on his purchase in case of delay in completion (*r*). But purchasers are advised to object to a stipulation binding them to pay interest on delay in completion arising "from any cause whatever" or "from any cause whatever other than the wilful default of the vendor" (*s*); not to agree to an excessive rate of interest, as 5*l.* per cent. under the present conditions of the money market; and to stipulate that, if delay in completion shall arise from the state of the title or any other cause except the purchaser's own fault, he may discharge himself of his liability to pay interest by duly appropriating his money to the purchase. Such a stipulation is, as we have seen (*t*), contained in the common form conditions of sale by auction of the Birmingham, Bristol, Liverpool, and Manchester Law Societies.

Re-sale.

A stipulation reserving to the vendor the right of re-sale on any breach of contract by the purchaser

(*n*) Above, pp. 67, 73.

(*o*) Above, p. 47.

(*p*) Above, p. 75, n. (*b*).

(*q*) Above, pp. 67, 74.

(*r*) Davidson, *Prec. Conv.* vol. ii.

pt. i. p. 4, 4th ed.; 1 Key & Elphinstone, *Prec. Conv.* 259, 351, 4th ed.; 247, 351, 8th ed.

(*s*) See above, p. 68.

(*t*) Above, p. 75, n. (*b*).

appears in well-known books of conveyancing precedents among the provisions usual in private sales (*u*). But there is certainly no settled practice to include such a condition in a private contract; and if it be inserted on the vendor's behalf, the purchaser's advisers are recommended to strike it out (*x*).

A form of private contract for sale will be found in the Appendix (*y*).

(*u*) Davidson, *Prec. Conv.* 256, 8th ed.
 vol. ii. pt. i. p. 4, 4th ed.; 1 Key
 & Elphinstone, *Prec. Conv.* 268,
 351, 4th ed.; 242, 319, 5th ed.;

(*x*) See Davidson's *Concise
 Precedents*, 112, n. (*a*), 18th ed.

(*y*) See Appendix B, below.

CHAPTER IV.

OF THE VENDOR'S OBLIGATION TO SHOW A GOOD
TITLE AND ITS DISCHARGE.

- § 1. Of the general nature of the proof required.
 § 2. Of the abstract.
 § 3. Of the verification of the abstract.

§ 1.—*Of the vendor's obligation to show a good title
 and its discharge.*

Origin of the
 rule, that the
 vendor must
 show a good
 title.

WE have seen (*a*) that every vendor of land is bound to show a good title to the property sold by him. This rule would appear to be of equitable origin. The Courts of Equity, in granting to a vendor the extraordinary relief of enforcing specific performance of the contract, considered that it was only fair to impose the condition, that he on his side should prove that he could actually convey what he professed to sell (*b*). And the obligation so established in equity was afterwards held to be equally incident to the contract at law (*c*). What the vendor has to prove, in order to fulfil this obligation, is that he can convey that which he contracted to sell; that is to say, if he engaged to sell a freehold or copyhold in fee (*d*), the fee simple free from incumbrances, or

(*a*) Ante, p. 32.

(*b*) *Jenkins v. Hiles*, 6 Ves. 646, 653; *White v. Foljambe*, 11 Ves. 337; *Devereux v. Bolton*, 18 Ves. 508; *Fildes v. Hooker*, 2 Mer. 424; *Parris v. Roper*, 9 Price, 488, 518, 519.

(*c*) *Flureau v. Thornhill*, 2 W. Bl. 1078; *Souter v. Drake*, 5 B. &

Ad. 992; *Doe d. Gray v. Stanion*, 1 M. & W. 695, 701. This rule had no place in the mediæval common law, when feoffees looked mainly to their feoffors' warranty for their security; see Wms. Real Prop. 444-6, 13th ed.; 588-590, 21st ed.

(*d*) As we have seen, a contract

if the property sold were leasehold, then the term for which he described it as held. But the nature and extent of the proof required was defined by a general rule of equity and law, adopted from the practice of conveyancers, whereby proof of title for not less than sixty years before the contract was held to be proof of a good title, if nothing appeared to the contrary (*e*). It is important to bear in mind, however, that this was merely a subordinate rule limiting the amount of evidence which the purchaser could require. It simply bound the purchaser to accept, as proof of a good title, evidence of sixty years' ownership ending in the vendor or in some person or persons whom the vendor would have the right to direct to convey; provided, however, that nothing appeared to show that the ownership so proved was not full or complete (*f*). But it was of no avail to show sixty years' title, if the result of the evidence produced were not to discharge the vendor's main obligation, that is, to prove that he could actually convey what he sold (*g*). Thus on the sale of a freehold in fee, if it were proved that the vendor and his predecessors had had possession and exercised acts of ownership for sixty years back, that would no doubt be *prima facie* evidence of a seisin in fee, and the purchaser would be bound to accept the title (*h*). But supposing it appeared from the vendor's evidence, or the purchaser could prove from other sources that such possession and ownership were enjoyed under a demise for a long

Proof of sixty years' title *prima facie* proof of a good title.

to sell a piece of land, without specifying what estate therein is to be conveyed, is construed as a contract to sell the whole estate therein, that is, in the absence of any limiting expressions, the unincumbered freehold in fee; above, p. 41.

(*e*) *Barnacell v. Harris*, 1 Taunt. 430, 432; *Cooper v. Emsey*, 1 Ph. 388; *Hodgkinson v. Cooper*, 9 Beav. 304; *Moulton v. Edmunds*, 1 De G.

F. & J. 246; Sug. V. & P. 365, 407.

(*f*) See note to *Parr v. Lovegrove*, 4 Drew. 183.

(*g*) See Sug. V. & P. 366; *Frend v. Buckley*, L. R. 5 Q. B. 213.

(*h*) See *Prusser v. Watts*, 6 Madd. 59; *Cottrell v. Watkins*, 1 Beav. 361, 365, 366; *Parr v. Lovegrove*, 4 Drew. 170, 177, 178; *Moulton v. Edmunds*, 1 De G. F. & J. 246.

term of years, it is obvious that the evidence of sixty years' title would not prove that the vendor could convey the fee simple which he sold. The purchaser therefore could require further evidence of the vendor's title to the fee simple, and if this were not forthcoming, would have the right to rescind the contract. It seems worth while to insist on this apparently simple distinction between the main rule imposing the duty of showing a good title, that is, a title to convey what was sold (*i*), and the subordinate rule defining the manner of proof. As a matter of fact, omission to remember this distinction has been a fruitful source of error, especially in cases where *the time* for which title can be required to be shown has been limited by special stipulation. In some such cases, the vendors, or their advisers, would appear to have forgotten that such a stipulation merely limits the evidence of title that can be asked of them in the first instance, and does not exempt them from the general duty of proving that they have the right to convey what they have sold (*k*).

Sixty years' title had to be shown, as a rule, in all cases.

A good title then is shown by proving such ownership as is promised by the contract; and the evidence required is evidence of the exercise of acts of ownership for a period of time which, in the absence of special stipulation, was fixed at not less than sixty years. The rule requiring evidence of sixty years' ownership in proof of title applied equally to a sale of freeholds, whether of inheritance or for lives, copyholds and leaseholds for years (*l*). In the case of leaseholds, if the

(*i*) *Lawrie v. Lees*, 7 App. Cas. 19.

(*k*) See *Phillips v. Caldwell*, L. R. 4 Q. B. 159; *Waddell v. Wolfe*, L. R. 9 Q. B. 515; *Nottingham Patent Brick and Tile Co. v. Butler*, 15 Q. B. D. 261, 271; 16 Q. B. D. 778; *Re Cox*

and *Neve's Contract*, 1891. 2 Ch. 109.

(*l*) *Barnwell v. Harris*, 1 Taunt. 430; *Cooper v. Emery*, 1 Ph. 388; *Hodgkinson v. Cooper*, 9 Beav. 304; *Moulton v. Edmonds*, 1 De G. F. & J. 246; Sug. V. & P. 365, 407.

lease were less than sixty years old, the vendor might be required to show the title to the freehold for such a period as, with the time expired since the grant of the lease, would make up sixty years (*n*). There were, however, certain cases in which the purchaser could call for earlier title than that of the last sixty years. These were the following:—

- (1.) Not less than one hundred years' title must have been shown to an advowson (*n*). 1. Advowson.
- (2.) Upon a sale of a long term of years, the lease must have been produced, although more than sixty years old. But after the date of the lease the title during the sixty years next before the date of the contract for sale was all that could be required (*o*). 2. Long term.
- (3.) Upon a sale of tithes or other property held under a grant from the Crown, the original grant must have been shown, although more than sixty years old. After the date of the grant, only sixty years' title prior to the contract need have been shown. The intermediate title could not be required (*p*). 3. Tithes or property held by Crown grant.
- (4.) Upon the sale of a reversionary interest, its creation must have been shown, whatever its antiquity (*q*). 4. Reversionary interest.

(*n*) *Purvis v. Roper*, 9 Price, 488; *Sauter v. Drake*, 5 B. & Ad. 992. The rule also applied to a contract to grant a lease, whether for lives or years, such a contract being regarded as equivalent to a sale for the time the lease was to run; *Roper v. Coombes*, 6 B. & C. 534; Sug. V. & P. 367, n. (1); *Stranks v. St. John*, L. R. 2 C. P. 376; see below, p. 101.

(*n*) Sug. V. & P. 367; 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; 329, 7th ed.; Wms. Real Prop. 449, 13th ed.; 592, 21st ed.

(*o*) Sug. V. & P. 370; *Freud v. Buckley*, L. R. 5 Q. B. 213; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.; 330, 7th ed.; Wms. Real Prop. 450, 13th ed.; 592, 21st ed.

(*p*) *Pickering v. Lord Sherborne*, 1 Craw. & Dix, 254; 1 Prest. Abst. 30, 2nd ed.; 1 Jarm. Conv. by Sweet, 68; Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.; 331, 7th ed.

(*q*) 1 Prest. Abst. 19, 2nd ed.; 1 Jarm. Conv. by Sweet, 61; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.; 329, 330, 7th ed.

Contract to grant a lease.

All these instances do but illustrate the point on which we have been insisting, that the vendor's obligation is to show that he has the right to convey what he sold, and unless the evidence offered in support of the title prove this, it is insufficient, though it were evidence of sixty years' ownership. The case of a sale of leaseholds is particularly instructive. On the ground that a purchaser of leaseholds was entitled equally with a purchaser of freeholds to the assurance that he should have the very thing he bought, it was held that the vendor was bound to produce the freeholder's title to grant the lease, if the lease were less than sixty years old (*r*). But if the lease had been granted more than sixty years before the sale, proof of sixty years' enjoyment under the lease would establish the presumption that it had been well granted, and in such case the freeholder's title could not be called for; although the lease itself must have been produced, in order to prove that the vendor could assign the very interest which he had sold (*s*). The other cases will be found to depend on similar principles.

Vendor and
Purchaser
Act, 1874.

Forty years'
title only now
required.

The law being as above stated, it was enacted in the Vendor and Purchaser Act, 1874 (*t*), as follows:—In the completion of any contract of sale of land (*u*) made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in

(*r*) See cases cited ante, p. 97, n. (*m*).

(*s*) Ante, p. 97.

(*t*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*u*) By the Interpretation Act, 1889 (Stat. 52 & 53 Vict. c. 63, s. 3, replacing 13 & 14 Vict. c. 21,

s. 4), in every Act passed after the year 1850 the expression "land" shall, unless the contrary intention appears, include messuages, tenements, hereditaments, houses and buildings of any tenure.

cases similar to those in which earlier title than sixty years may now be required. This enactment in no way detracts from the main rule that the vendor must show a good title; it merely reduces the time, for which title must, as a rule, be proved, from sixty to forty years. By the same Act (*x*), the purchaser of a term of years was deprived of the right to call for the title to the freehold, in the absence of stipulation to the contrary; and by the Conveyancing Act of 1881 (*y*) the purchaser of a term granted by underlease was deprived of the right (unless expressly reserved) to call for the title to the leasehold reversion. The latter Act also took away from the purchaser of land, once of copyhold or customary tenure but converted into freehold by enfranchisement, the right (except by express agreement) to call for the title to make the enfranchisement (*z*). We have seen that a purchaser of leaseholds was entitled to call for the production of the lessor's title on the ground that the validity of a lease depends on the lessor's power to grant it (*a*). And where enfranchisement has been effected by the lord's conveyance of the freehold to the tenant, it is obviously material to prove the title to make the enfranchisement in order to establish a good right to the land (*b*). But before the above-mentioned enactments were passed purchasers frequently submitted in practice to special stipulations of the like nature (*c*), which seems to be the reason why these statutory provisions were made.

(*x*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 3 (1), (9).

(*z*) Sect. 3 (2), (9).

(*a*) Ante, p. 98.

(*b*) Sug. V. & P. 372; 1 Dart, V. & P. 289, 5th ed. Enfranchisement under the Copyhold Acts, 1841, 1852, or 1894, makes the land freehold, irrespectively of the validity of the lord's title; which is therefore immaterial and

cannot be inquired into on a sale of the land after such enfranchisement; see Stat. 4 & 5 Vict. c. 35, s. 61; *Kerr v. Pearson*, 25 Beav. 394; 1 Dart, V. & P. 166, 290, 5th ed.; 189, 330, 6th ed.; 183, 326, 7th ed.; Stat. 57 & 58 Vict. c. 46, ss. 21, 26 (3), (4), 38, 61.

c 1 Dav. Prec. Conv. 531, 623, n. (*y*), 4th ed.; 1 Dart, V. & P. 166-68, 5th ed.; Wms. Real Prop. 452, 13th ed.

Title on purchase of leaseholds for years—

of enfranchised copyholds.

Enfranchisement under the Copyhold Acts.

The present law.

The present law therefore is this:—The vendor is bound to show a good title, that is, he must prove that he has the right to convey what he sold. In some exceptional cases he may be able to offer summary and complete proof of this, as where a title, good against all the world, is vested in him by Act of Parliament (*d*). But, as a rule, he will have no alternative but to give evidence of the ownership of himself and his predecessors for a certain time back. This time, in the absence of special stipulation, must be not less than forty years, but this general rule is modified by the considerations and enactments already stated (*e*). A purchaser under an open contract is therefore entitled to call for the title mentioned below in the following cases of sale:—

1. Freeholds or copyholds.

1. Of freeholds of inheritance or for lives, or copyholds, title for forty years next before the contract (*f*). In the case of freeholds for lives, the lease for the lives must be produced, though more than forty years old.

2. Enfranchised copyholds.

2. Of freeholds, formerly copyhold but enfranchised within forty years of the sale, the freehold title back to and including the enfranchisement, and beyond that the copyhold title back to forty years before the contract (*g*), but not the title to make the enfranchisement (*h*).

3. Leaseholds for years.

3. Of leaseholds for years, production of the lease under which the property is held in all cases; and, if the lease be more than forty years old, the title under the lease for the forty years next before the contract, otherwise the whole title subsequent to the lease: but not in any case the title to the freehold, nor, in the case

(*d*) This might be by special Act of Parliament, and appears to be the case with persons registered as owners with an indefeasible title under the Land Registry Act, 1862 (Stat. 25 & 26 Vict. c. 52, s. 20), or with an absolute title under the Land Transfer Act, 1875 (Stat. 38 & 39 Vict. c. 87, s. 7); see 1 Dart,

V. & P. 305, 306, 5th ed.; 347, 6th ed.; 342, 7th ed.; Land Transfer Act, 1897 (Stat. 60 & 61 Vict. c. 65, s. 16); below, Chap. XX.

(*e*) Ante, pp. 95—99.

(*f*) Ante, pp. 95, 98.

(*g*) Sug. V. & P. 372; 1 Dart, V. & P. 289, 5th ed.

(*h*) Ante, p. 99, and n. (*b*).

of the sale of property held by underlease (*i*), the title to any leasehold reversion (*k*). Here we may remark that the same law applies on a contract to grant a lease for years (*l*), the intended lessee being precluded, in the absence of stipulation to the contrary, by the Vendor and Purchaser Act, 1874 (*m*), from calling for the title to the freehold, and by the Conveyancing Act of 1881 (*n*) from calling for the title to any leasehold reversion to the intending lessor's interest. But on a contract to grant an underlease, the intending lessor still remains liable to produce the lease under which he holds, and to show the subsequent title thereunder, if it be less than forty years old, otherwise the last forty years' title thereunder.

Contract to grant a lease for years.

Contract to grant an underlease.

4. Of an advowson, title for at least one hundred years before the contract (*o*).

4. Advowson.

5. Of tithes or other property held under a grant from the Crown, production of the original grant in all cases, and title thereunder for the forty years next before the contract (*p*).

5. Tithes, or property held by Crown grant.

6. Of a reversionary interest, production of the instrument which created it, in all cases; and in addition proof that possession of the land has been in accordance with the instrument so produced (*q*). If the reversionary interest were created less than forty

6. Reversionary interest.

(*i*) Ante, pp. 97, 99. Here it may be noted that, on the sale of a term granted by an underlease, the property must be described as held by *underlease*. For if property sold be described as held by lease, that is intended to mean a lease from the freeholder, so that if the vendor be possessed only of a term granted by underlease, he is not in a position to fulfil the contract; *Re Beyfus and Masters's Contract*, 39 Ch. D. 110; see above, p. 80.

(*k*) *Gosling v. Woolf*, 1893, 1 Q. B. 39.

(*l*) Above, p. 97, n. (*m*).

(*m*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1; *Jones v. Watts*, 43 Ch. D. 574.

(*n*) Stat. 44 & 45 Vict. c. 41, s. 13.

(*o*) 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; 329, 7th ed.; Wms. Real Prop. 451, 13th ed.; 592, 21st ed.

(*p*) 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.; 331, 7th ed.

(*q*) 1 Jarm. Conv. 3rd ed. by Sweet, 61, 62; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.; 329, 330, 7th ed.

Property held by underlease must be so described.

years before the contract, of course the whole title subsequent to its creation must be shown. In other cases it would appear to depend on the nature of the interest sold what title ought to be shown subsequently to its creation. If the property sold were a reversion or remainder to which any rent is incident, then the purchaser could call for production of the last forty years' title, but not the intermediate title. For in such a case there is a perception of tangible profits by receipt of rent, and this affords evidence of title as against not only the rent-payer but others as well. If however what was sold were a bare right, the apparent devolution thereof to particular persons for the last forty years can raise no presumption of the establishment of a right superior to the claims of others. In this case therefore there seems to be no good reason for putting any time-limit to the required proof that the vendor has the right to convey what he sold ; and it is thought that the whole title, from the creation of the reversionary interest to the contract for sale, can be called for.

The best and the usual evidence of title is production of the title-deeds.

At the present time then, the vendor, in order to show a good title to the property sold, has, as a rule, to give evidence of the last forty years' ownership thereof, and to make out that such ownership ends either in himself or in some person or persons whom he is entitled, either unconditionally or upon certain conditions of which the performance rests with himself alone (such as the payment off of mortgages), to direct to convey. Now, as some of the best evidence of ownership is proof of the power of disposition incident to ownership, especially for valuable consideration (*r*), and as proof that the vendor has the right to convey what he sold must necessarily be made out by showing the devolution of the ownership of the land, it usually happens that the

(*r*) See Burt. Comp. pl. 418-427.

main evidence offered in support of the vendor's title is the deeds, by which the land sold has been conveyed on former sales or mortgages thereof, and any will, by which the land may have been devised. Thus the chief evidence of title given on sales is almost entirely documentary. This results of course from the fact that ever since the end of the mediæval period of law, the usual method of making a conveyance of land has been by the execution of deeds or a deed (s). If then, on the sale of a freehold in fee, the vendor produce the title-deeds for the last forty years, and these show that the fee simple in the land sold has been conveyed to him, free from incumbrances, and if there be satisfactory evidence that the deeds produced relate to the land sold, and the vendor be in possession of the land and of the deeds, he has shown a good title to the land. But although title deeds are the most common, and, owing to the long prevailing custom of conveyance by deed, the best evidence of title, it must not be supposed that they are the only evidence which the purchaser is bound to accept. This will appear clearly if we bear in mind our main rule, that what the vendor has to show is that he has the right to convey what he sold, and our subordinate rule, that, if nothing appear to the contrary, this shall be taken to be shown on proof of forty years' ownership, that is, in the case of freeholds, forty years' seisin in fee, ending in the vendor. Now forty years' seisin in fee may be proved without deed; as by evidence of the seisin of some ancestor of the vendor forty years ago, and of devolution of the title to the vendor by descent. And if the facts of possession and kinship on which such a title must depend, were fully proved, the purchaser would be bound to accept it (t). But to illustrate the above rules further,

Other evidence of title.

(s) See Wms. Real Prop. 145, 361, 365, 366; *Dorling v. Chapman*, 1 H. & M. 402; Sug. V. & P. 200 sq., 21st ed.

(t) *Cottrell v. Watkins*, 1 Beav. 410, 421; 2 Prest. Abst. 23, 2nd

it may be observed that the vendor of a freehold in fee would scarcely discharge his obligation to show a good title by simply proving that he himself had been in possession of the land sold for forty years. For although the rule applicable in actions for the recovery of land is that possession is *prima facie* evidence of a seisin in fee (*u*), it is considered that, on sales, the purchaser is entitled to better proof, that the vendor has the right to convey what he sold, than is afforded by facts equally consistent with his being entitled for life or years only as with his having the entire fee simple (*x*). In such a case therefore it is thought that the purchaser could require the vendor to show the origin of his possession, and to establish that he entered as tenant in fee, for instance, under a conveyance on sale to him, or as heir, or upon a wrongful entry (*y*).

Title de-
pending on
Statute of
Limitations.

Here it may be noticed that the Court will compel a purchaser to take a title depending on the Statute of Limitations, that is to say, depending on the extinguishment under that Statute (*z*) of the right and title of some person or persons who are shown to have been rightfully entitled (*a*). But it must not be supposed that this doctrine enables a vendor, who has been in possession for twelve or even thirty years to escape the common obligation of showing forty years' title as proof of a good title. Possession for these periods does not give a good title under the Statute as against all the world; it does not bar the rights of remaindermen

ed.; 1 Dart, V. & P. 298, 336, 5th ed.; 340, 380, 381, 6th ed.; 334, 376, 377, 7th ed.

(*u*) *Doc d. Hall v. Penfold*, 8 C. & P. 536, *Cole on Ejectment*, 211.

(*x*) See *Hiern v. Mill*, 13 Ves. 114, 122; *Eyton v. Dicken*, 4 Pri. 303; *Cottrell v. Watkins*, 1 Bea. 361, 365, 366; *Sug. V. & P.* 461;

1 Dart, V. & P. 334, 5th ed.; 379, 6th ed.; 372, 373, 7th ed.

(*y*) See *Co. Litt.* 189 b, and n. (7); *Leach v. Jay*, 9 Ch. D. 44.

(*z*) *Stat. 3 & 4 Will. IV. c. 27*, s. 34.

(*a*) *Scott v. Nixon*, 3 Dru. & War. 388; *Games v. Bonnor*, 54 L. J. Ch. 517; 33 W. R. 64.

or reversioners not entitled to possession until the determination of some particular estate (*b*). It does not appear therefore that a vendor's obligation of showing a good title can be discharged by proof of thirty or even forty years' possession by himself alone, without showing, if the Statute of Limitations be relied on, who were rightfully entitled and that the vendor's possession has effectually barred their claims (*c*).

A good title then may be shown without deed. But the deeds are the best evidence of title; and if the land sold has been conveyed by deed within the period for which title has to be shown, it is not open to the vendor to prove forty years' seisin in fee by other means. He must produce the deeds, or if they be lost or destroyed, give proper secondary evidence of their contents (*d*).

Vendor must produce the title-deeds, if he can.

§ 2. *Of the Abstract of Title.*

Evidence of title on sales being for the most part documentary (*e*), and such as can be weighed only by skilled legal advisers, it became usual to facilitate the task of judging of the effect of the title-deeds by making an abstract of their contents for the perusal of the purchaser's counsel. It appears that formerly the deeds were handed over to the purchaser for examination, and any abstract of them which he might require was made at his expense. But afterwards it became established that the vendor was bound to make at his own expense and deliver to the purchaser an abstract of

Vendor bound to make and deliver an abstract of title.

(*b*) Stat. 37 & 38 Vict. c. 57, ss. 1-5; *Pedder v. Hunt*, 18 Q. B. D. 565; *Re Earl of Devon's Settled Estates*, 1896, 2 Ch. 562.

(*c*) *Jacobs v. Revell*, 1900, 2 Ch. 858; *Farwell, J., Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391, 401, affirmed, 1906, 1 Ch. 386. It is respectfully submitted that

the *dictum* here cited is unexceptionable: but the decision in this case is criticised by the writer in 51 Sol. J. 141, 155.

(*d*) *Bryant v. Bask*, 4 Russ. 1; *Moulton v. Edmonds*, 1 De G. F. & J. 246.

(*e*) *Ante*, p. 103.

the title to the property sold (*f*) ; and so the law still remains (*g*).

What the abstract ought to contain.

Speaking generally, the abstract of title ought to contain a statement of the material parts of every deed, will or other instrument, by which any disposition of the property was made during the time for which title has to be shown ; it ought also to contain a statement of every birth, death, marriage, bankruptcy or other event material to the devolution during the same period of the estate contracted to be sold (*h*). If the earliest piece of evidence stated on the abstract be an instrument of disposition, and this be offered in unsupported proof of the commencement of the vendor's title, it must be what is called a good root of title ; that is to say, it must be an instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified, and showing nothing to cast any doubt on the title of the disposing parties. If the instrument be deficient in any of these particulars, the purchaser may require further evidence to supply the deficiency (*i*). For example, if the abstract commence with a will containing a general devise of the testator's real estate, under which the property sold is alleged to have passed, the purchaser will be entitled to require evidence of the testator's seisin (*k*). And if the first abstracted deed be a conveyance of an equity of redemption, that is, of land subject to a mortgage either in fee or for a term of years, it is

The abstract should commence with a good root of title.

General devise.

Conveyance of an equity of redemption.

(*f*) Sug. V. & P. 406.

(*g*) It has not been altered by sect. 3 (6) of the Conveyancing Act of 1881 ; *Re Johnson and Tustin*, 30 Ch. D. 42.

(*h*) Sug. V. & P. 405 *sq.* ; 1 Dart, V. & P. 279 *sq.*, 5th ed. ; 319 *sq.*, 6th ed. ; 315 *sq.*, 7th ed. ;

Re Wallis & Grout's Contract, 1906, 2 Ch. 206.

(*i*) 1 Dart, V. & P. 295 *sq.*, 5th ed. ; 337 *sq.*, 6th ed. ; 331 *sq.*, 7th ed. ; *Re Cox & Neve's Contract*, 1891, 2 Ch. 109, 118.

(*k*) *Parr v. Lovegrove*, 4 Drew. 170.

thought that the purchaser is entitled to require the mortgage deed (however old) to be abstracted and produced (*l*). But a conveyance in fee on a sale or by way of mortgage is a good root of title. So a transfer of a mortgage in fee appears to be a good root of title, where it is made with the concurrence of all parties interested in the equity of redemption, and a new equity of redemption is reserved. But unless a new equity of redemption be reserved, a transfer of a mortgage appears to be no more a good root of title than a conveyance of the equity of redemption is.

Transfer of mortgage.

The necessity for a good root of title is explained by referring to the rule that a good title is shown by proof of forty years' title. This means forty years' title to the whole estate sold; so that if the fee be sold, what the vendor has to prove is forty years' seisin in fee. He must therefore begin by proving a seisin in fee by himself or his predecessor of the property sold forty years before the contract, and end by showing a like seisin at the present time in himself or some person whose conveyance of the property he has a right to procure (*m*). It is accordingly equally incumbent on him to produce good evidence of the possession of the whole estate contracted for at the time of the commencement of title as to show that this estate is now his to convey. This is the reason why further evidence may be required by the purchaser, if the first document on the abstract be insufficient of itself to prove the ownership of the whole estate. Considered with regard to this principle, the conveyance of an equity of redemption (*n*) and a lease for years, even though it be a demise by way of mortgage for a long term, obviously fall short of the requirements of a good

Reason of the rule requiring a good root of title.

Conveyance of equity of redemption.

(*l*) This follows from the principles laid down in *Phillips v. Caldwell*, L. R. 4 Q. B. 159; *Re Cox & Neve's Contract*, 1891, 2 Ch. 109, 117, 118.

(*m*) Ante, p. 102; and consider the cases cited above, p. 106, notes (*h*), (*i*).

(*n*) Above, p. 106.

Deed exercising a power.

Disentailing assurance.

Whether the abstract must commence with a conveyance for valuable consideration.

root of title. So a deed appointing an estate under a power of appointment is not of itself a good root of title; as to have a power of appointment over an estate is not the same as to be the owner of it, and what a vendor has to prove is the full ownership, at the time of commencement of title, of the estate he is selling. For evidence of such ownership he must go back to the deed, which created the power (*o*). On the same principle, a disentailing assurance is not a good root of title; as it only shows the ownership of an estate tail at the time of commencement of title, and this, like a power of appointment, is merely a derivative interest and not full ownership, which is fee simple. In such cases, the deed creating the estate tail should be abstracted (*p*).

It is of course advisable for a vendor to commence his abstract with a conveyance for valuable consideration, as that affords the strongest evidence of ownership, not only because it shows that someone was willing to give money for the property, but also on account of the presumption that on a sale or mortgage the prior title was investigated in the usual way and was approved. It does not appear however that a purchaser can object to an instrument of disposition forty years old as a root of

(*o*) 1 Jarm. Conv. 3rd ed. by Sweet, 67; 1 Dart, V. & P. 297, 5th ed.: 339, 6th ed.; 333, 7th ed. By the Conveyancing Act, 1881 (Stat. 44 & 45 Vict. c. 41, s. 3 (3)), a purchaser of any property shall not require the production or any abstract or copy of any document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser. But as, by sect. 3 (11), this provision is to be treated, for the purpose of

the specific performance of the contract, like an express stipulation to the same effect, it follows, according to the principle laid down in *Re Marsh and Earl Granville*, 24 Ch. D. 11, that, unless a vendor fairly and explicitly stipulates that the abstract shall commence with a deed exercising a power, he cannot take advantage of this enactment in enforcing specific performance against the purchaser.

(*p*) 1 Prest. Abst. 5-7; Sug. V. & P. 366; 1 Dart, V. & P. 297, 5th ed.; 339, 6th ed.; 333, 7th ed.

title on the ground that the disposition was not made for valuable consideration or was made on an occasion on which it is not usual to investigate the title. Thus it seems that a voluntary conveyance (*q*), or a family settlement would be an unobjectionable root of title, if made by deed forty years old, and that a will containing a specific devise would be a sufficient root of title, if the testator died at least forty years before the sale; although in such cases the most prudent course for the vendor would undoubtedly be to specify in the contract or conditions of sale the nature of the instrument with which the title was to commence. But if the vendor make a special stipulation limiting the time for which title shall be shown to a shorter period than is given by law, different considerations apply. Such a stipulation must be fair and explicit, or the vendor, in seeking specific performance, will not be allowed to insist on it. If therefore a stipulation be made that the title shall commence with a particular deed less than forty years old, the purchaser is entitled to assume that the deed was made on an occasion on which the title would be investigated; and should this not be the case, as if the deed were voluntary, the vendor cannot force him, in an action for specific performance, to accept the title as limited by the condition (*r*). Such conditions, to be effectual as regards the specific performance of the contract, must state clearly the nature of the instrument, with which the title is to commence.

Voluntary conveyance : family settlement.
Specific devise.

Root of title where the time for showing title is curtailed by special stipulation.

After the document forming the root or commencement of title, there should be abstracted every subse-

What documents should be abstracted

(*q*) Cotton, L. J., *Re Marsh and Earl Granville*, 24 Ch. D. 11, 24. The contrary is stated by the editors of Dart, 1 V. & P. 339, 6th ed. : 333, 7th ed., relying on the decision in the above case : but it is submitted that this deci-

sion goes no further than is stated below, and has no application, where the purchaser's rights are not curtailed by special stipulation.

(*r*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

after the root
of title.

quent document, whether deed or will, which deals with the legal estate in the property sold, except expired leases (*s*); and all facts whereon the title depends, such as births, marriages, deaths or bankruptcies, should be stated in their proper order. With regard to documents affecting the equitable but not the legal estate in the property sold, if they be documents on which the purchaser's title will necessarily depend, they certainly ought to be placed on the abstract (*t*). But as a purchaser for value, who takes a conveyance of the legal estate in any property, is not bound by any equitable interests therein, of which he has no notice, it is obvious that there may be many documents creating equitable interests only which are not necessary to the purchaser's title, so long as he obtains the legal estate without notice of them. For instance, the vendor may be possessed of documents showing that some former owner who appeared on the face of a conveyance to be entitled for his own benefit, was in fact a trustee, or that persons who had advanced money on mortgage were trustees of the mortgage money. In such cases it would be unusual to allow notice of the trust to appear on the abstract (*u*). This, Mr. Dart points out, is no doubt a departure from the general principle that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title; but it is sanctioned by convenience and universal practice (*x*). Again, if a charge should have been created on the property by a document which could only create an equitable interest therein, and the charge should afterwards have been paid off, it is not the practice to let these facts

(*s*) And except as mentioned above, pp. 100—102; 1 Dart, V. & P. 299, 5th ed.; 340, 6th ed.; 335, 7th ed.; and consider *Whitting to Loynes*, 14 Ch. D. 822; 17 Ch. D. 10; *Re Wallis & Grout's Contract*, 1906, 2 Ch. 206.

(*t*) 1 Dart, V. & P. 299, 5th ed.; 341, 6th ed.; 335, 7th ed.

(*u*) 1 Dart, V. & P. 299, 300, 5th ed.; 341, 342, 6th ed.; 335, 336, 7th ed.

(*x*) See *Re Harman and Uxbridge*, *see. Ry. Co.*, 24 Ch. D. 720.

appear on the abstract (*y*). This is contrary to the rule laid down by Wood, V.-C., in *Drummond v. Tracy* (*z*), who stated that he had no doubt that such charges ought to be communicated to the purchaser. It was observed however by Mr. Dart (*a*), that the strict rule so laid down may be theoretically correct: but its practical inconvenience, as much to purchasers as vendors, is so great, that in practice it had previously been all but universally ignored: nor has the practice, it is believed, been materially, if at all, affected by that decision.

The general rule then as to what documents ought to be abstracted is that laid down by Lord St. Leonards (*b*):—"The solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of title, he ought to abstract *every* subsequent deed." This general rule is however qualified, as we have seen, by the practice of not disclosing trusts such as the trusts of money advanced by trustees on mortgage, or of purchases where the trustee appears on the face of the conveyance to be entitled for his own benefit; and by the practice of not abstracting merely equitable charges which have been paid off. There is a difference however between equitable charges which may and those which cannot affect the legal estate. A mortgage of an equity of redemption, or second mortgage, made by deed, with a proviso for redemption in the same form as a legal mortgage, could operate to convey the legal estate if it should not have passed by the prior mortgage. Such a charge, Mr. Dart pointed out (*c*), should rarely or never be suppressed. Equitable charges created

(*y*) 1 Dart, V. & P. 301, 5th ed.; 343, 6th ed.; 337, 7th ed.

(*z*) John. 608, 612.

(*a*) Ibid.

(*b*) Sug. V. & P. 407.

(*c*) 1 Dart, V. & P. 300, 5th ed.; 342, 6th ed.; 336, 7th ed.

by a mere memorandum in writing or by deposit of title-deeds stand on a different footing; for without a deed the legal estate in lands cannot be affected by such charges. In spite of the rule to the contrary laid down in *Drummond v. Tracy* (*d*), it is the practice to make no mention of such charges in the abstract after they have been paid off; nor are they generally disclosed, even when still subsisting (*e*).

The manner
of making
an abstract.

Some few words should be said about the manner in which deeds or other documents should be abstracted. At the present day, the work of making an abstract of title is often so indifferently performed that it seems necessary to point out that the vendor is bound to furnish such an abstract of the contents of the deeds as shall enable the purchaser's counsel to judge of their effect. The purchaser cannot therefore be required to accept as a proper abstract any mere statement of the effect of any operative clause, which is material to the title; he is entitled to be informed of the exact words used in every material part of any document abstracted. For the whole object of requiring an abstract of title is to enable the purchaser's conveyancing counsel to examine the title in a convenient way (*f*); the abstract is all he sees; and if the very words used are not placed before him, it is impossible for him to exercise his judgment on the title. And counsel should not accept a mere statement of the effect of a material clause provisionally, subject to the statement proving to be correct; for this is to delegate the determination of a matter, to which he ought to apply his own judgment, to the discretion of the gentleman, who examines the abstract with the deeds (*g*). The general rule then is that the

(*d*) John. 608.

(*e*) 1 Dart, V. & P. 300-302, 5th ed.; 342-344, 6th ed.; 336-338, 7th ed.

(*f*) Ante, p. 105.

(*g*) See 1 Prest. Abst. 116, 117, 2nd ed.

exact words of all material clauses should appear in the abstract. The material clauses are those which have taken effect upon the estate, to which the title is being shown. Thus in deeds of conveyance, the names and descriptions of the parties, the recitals, which show their intention, the testatum with its statement of the consideration and operative words, the parcels, the habendum, and the declaration of uses or of trusts, if any, are all material to the conveyance of the estate and should be fully abstracted. Of covenants for title, however, it is, as a rule, sufficient to know that they were entered into in the usual way. If therefore such covenants have been given at large in the common forms in use before the year 1882, it is enough to state their effect. When covenants for title have been incorporated in deeds under the Conveyancing Act of 1881 by the use of the proper statutory expressions, these expressions should of course be abstracted *verbatim*. So all powers which are exercised by any abstracted document should be fully abstracted: but it is sufficient simply to refer to powers which have not been exercised. The same considerations apply to the abstracting of any provisos which may abridge or affect the estate limited. Shifting clauses, for instance, should be fully abstracted, if they have come into operation; if not, they need only be mentioned with a statement of the events in which they were intended to operate. Joint account clauses ought to be fully abstracted, if they have taken effect. And a proviso for reconveyance should always be so abstracted as to show the charge created, the terms of redemption, and to whom the reconveyance is to be made; for in a mortgage the proviso for reconveyance, being a qualification of the conveyance to the mortgagee, is just as much an operative part of the deed as the conveyance itself (*h*). All documents material to the title should

What are
material
clauses.

Covenants
for title.

Powers.

Shifting
clauses.

Joint account
clauses.

Provisoes for
redemption.

(*h*) See 1 Prest. Abst. 147-153; Sug. V. & P. 407-410; and see Chap. V., below.

Documents
incorporated
by reference.

be abstracted in chief, notwithstanding that they may be fully recited in some subsequent instrument (*i*): but if this be done, the subsequent recital need not of course be set out at large; it will be sufficient to refer to the recited document as "hereinbefore abstracted." And all documents should be abstracted which are incorporated in the title by reference—as where land is assured to the uses of some settlement—even though the document be of an earlier date than the time of commencement of title.

Execution of
deeds, &c.
should be
stated.

The abstract should always state what parties to any title-deed executed the same and whether such execution was attested; and in the case of documents which are invalid unless attested by some particular number of witnesses or executed with some other special formality, such as wills (*k*), or deeds exercising powers required to be exercised with some special formality (*l*), the number of attesting witnesses or other circumstances attending the execution of the document in question should always be mentioned; so that the conveyancer may be satisfied that every requisite formality has been duly observed. The receipts usually endorsed on purchase and mortgage deeds before the year 1882 (*m*) should be mentioned, as their absence was accounted an informality (*n*). And any formality necessary to give complete effect to any abstracted document should be stated; as probate of a will of personal estate (*o*), the registration of deeds or wills of lands in Middlesex or Yorkshire (*p*), the

(*i*) 1 Dart, V. & P. 299, 5th ed.; 341, 6th ed.; 335, 7th ed.; *Re Stamford, &c. Co. and Knight's Contract*, 1900, 1 Ch. 287; *Re Wallis and Groult's Contract*, 1906, 2 Ch. 206.

(*k*) See Williams, Real Prop. 206, 13th ed.; 245, 21st ed.

(*l*) Ibid. 298-302, 13th ed.; 384-387, 21st ed.

(*m*) Williams, Real Prop. 193-4, 13th ed.; 627, 628, 21st ed.; Williams, Conv. Stat. 227, 229.

(*n*) Romilly, M. R., *Greenstade v. Dare*, 20 Beav. 284, 292; 3 Prest. Abst. 15, 2nd ed.

(*o*) Williams, Pers. Prop. 385, 11th ed.; 447, 16th ed.

(*p*) Williams, Real Prop. 196, 223, 13th ed.; 212, 262, 21st ed.

enrolment of a disentailing deed (*q*), or the acknowledgment (when necessary) of a deed of conveyance by a married woman (*r*).

It has been considered that a map or plan is no necessary part of an abstract (*s*). But the correctness of this opinion may be doubted; as the verification of the parcels is part of a conveyancing counsel's duty (*t*), and he cannot efficiently discharge it without seeing the plans referred to in the various title-deeds. And when, as is now very frequently the case, a conveyance is made identifying the parcels by reference to a plan, without any separate and independent description of them, it is obvious that the plan is really a material part of the deed, and ought as such to be included in the abstract. It is thought therefore that tracings of any plans referred to in the title-deeds should in all cases be inserted at their places in the abstract; and that, at least wherever a plan is a material part of a title-deed, the purchaser can require to be furnished with a copy thereof as part of the abstract (*u*).

Tracings of
maps or
plans.

§ 3. *Of the verification of the abstract.*

Besides delivering an abstract of title, the vendor is further bound, in order to discharge his obligation of showing a good title, to verify the abstract by producing all the evidence which is necessary and proper to prove the statements made therein. The vendor must therefore produce, for the examination of the purchaser or his solicitor, all the abstracted deeds, both those which he has in his own possession and those of which he has

Vendor bound
to verify the
abstract.

(*q*) Williams' Real Prop. 49, 13th ed.; 99, 21st ed. Sug. V. & P. 408.

(*r*) Ibid. 233, 13th ed.; 310, 21st ed. (*t*) Sug. V. & P. 413.

(*u*) 1 Dart, V. & P. 303, 304, 5th ed.; 345, 346, 6th ed.; 339,

(*s*) *Blackburn v. Smith*, 2 Ex. 5th ed.; 345, 346, 6th ed.; 339, 733, 792, 18 L. J. N. S. Ex. 187; 340, 7th ed.

a right to procure the production, and proper evidence of other documents, on which the title depends, such as wills, inclosure awards, Acts of Parliament or orders of the Court; and he must adduce proper evidence of all facts material to the title, as births, marriages, deaths or intestacies (*x*). At common law all such proof had to be made at the vendor's expense (*y*): but now under the Conveyancing Act of 1881, the purchaser, in the absence of stipulation to the contrary, has to bear the expense of obtaining and producing all evidence of title, which is not in the vendor's possession (*z*).

Expense of evidence not in vendor's possession.

Evidence required is (1) of documents, (2) of facts.

Proof on sales differs from proof in litigation.

Documents thirty years old prove themselves.

The proof, which a vendor may be required to furnish of his title, is of two kinds; (1) proof of the abstracted documents, and (2) proof of the facts stated in the abstract. In both of these respects the evidence accepted on sales is not quite the same as what would be required to be given in a court of justice. Thus where it is sought to prove in Court that any person has altered his legal position by some writing, it must be shown, first, that there is or was such a writing as alleged; this is proved primarily by production of the original; and secondly, that the writing is his writing; that is to say, if the writing be a deed, that it is his deed, that is, executed by him, or, if the writing be unsealed, that it was signed or written by him or by his authority so as to bind him (*a*). At common law, the second requisite was only dispensed with in the case of documents thirty years old coming from the proper custody; these, whether deeds, wills, letters or similar writings, were and are presumed to have been executed or signed as they purport to be (*b*). In other cases, the

x Sug. V. & P. 414, 415, 417, 420, 429, 431; 1 Dart, V. & P. 310 sq., 5th ed.; 350 sq., 6th ed.; 345 sq., 7th ed.; *Southby v. Hunt*, 1 My. & Cr. 207, 212, 213.

(*y*) Sug. V. & P. 417, 420, 431.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 3 (6), (9).

(*a*) *Leyfield's Case*, 10 Rep. 88a, 92b, 93a.

(*b*) Taylor, Evidence, §§ 74, 75, 593-601, 5th ed.; Stephen, Evidence, Art. 88.

execution of any document produced must as a rule have been proved, if the document were attested, by the evidence of an attesting witness, and otherwise by the best evidence, such as the testimony, given in Court at the trial, of the party who executed the document, or some other person present at its execution, or an admission by or on behalf of such party of the fact of execution (*c*). The common law rule as to proving the execution of attested documents was so stringent that such execution could not be proved by the admission of the executing party, unless made for the purposes of the cause (*d*). This rule was abolished by the Common Law Procedure Act, 1854, with regard to any instrument, to the validity of which attestation is not requisite; and such instruments may be proved by admission or otherwise, as if there had been no attesting witness thereto (*e*). Under the present practice, the execution of any deed or writing adduced in evidence in an action is generally established by admission made pursuant to a notice in that behalf, which either party may serve on the other (*f*): but of course where there is any contest as to the fact of execution, it must be proved by the best evidence according to the ordinary rule (*g*). And on unopposed applications and in non-contentious cases the rule still is that the execution of a deed must be proved by an attesting witness (*h*). Upon sales of land, however, it is not the practice to require evidence of the execution of any of the documents of title, however recent, if found in the proper custody (*i*); unless there

Proof of
attested
documents.

No evidence
of the execu-
tion of any
document
required on
sales.

(*c*) Taylor, Evidence, §§ 1637 sq., 1660, 5th ed.; Stephen, Evidence, Arts. 15 sq., 63-59.

(*d*) *Call v. Dunning*, 4 East, 53; *Doe v. Durnford*, 2 M. & S. 62.

(*e*) Stats. 17 & 18 Vict. c. 125, s. 26; 28 & 29 Vict. c. 18, ss. 1, 7.

(*f*) R.S.C. 1883, Ord. XXXII. rr. 2, 3, and Appendix B. No. 11.

(*g*) *Leigh v. Lloyd*, 35 Beav.

455, 457, 458.

(*h*) *Re Reay's Estate*, 1 Jur. N. S. 222; *Re Rice*, 32 Ch. D. 35; 1 Seton on Judgments, 156, 6th ed.

(*i*) That is, the custody in which they may reasonably be expected to be found; *Croughton v. Blake*, 12 M. & W. 205, 208; *Doe d. Jacobs v. Phillips*, 8 Q. B. 158.

be reason to suspect that some particular document was not in fact executed as it purports to be. In the absence of any cause for suspicion, it is presumed by conveyancers that every deed, will or other document of title was executed or signed as appears on the face of the document (*k*). Conveyancers act, in this respect, on the presumption that everything is rightly done, until the contrary be shown (*l*); a presumption which is of course greatly strengthened by the fact of the title-deeds being in the custody of the possessors of the land, to which the deeds relate.

What is the strict right of a purchaser as to proof of execution of title-deeds?

The strict right of a purchaser of land in the matter of requiring proof of the execution of the title-deeds has never been exactly defined. Under the old common law practice requiring strict proof of attested documents (*m*), there were conflicting decisions at *Nisi Prius* upon the question whether a vendor suing the purchaser at law for damages for breach of contract must prove the execution of the title-deeds as part of his title (*n*). It was pointed out, however, that such actions are usually brought in consequence of a dispute raised as to the vendor's title—that is, as to the *effect* of the deeds—after the delivery of an abstract and communications thereon, in the course of which the *authenticity* of the deeds has been admitted; and that in such circumstances the purchaser would not be permitted to turn round at the trial and require proof of the genuineness

(*k*) Coventry, Conveyancers' Evidence, 13-16; 1 Sug. V. & P. 418, 438; 1 Dart, V. & P. 312, 5th ed.; 353, 6th ed.; 348, 7th ed. See *Jared v. Clements*, 1902, 2 Ch. 399, 402; 1903, 1 Ch. 428, 431.

(*l*) Litt. sect. 377; Co. Litt. 232 b; *Clarke v. Imperial Gas Light and Coke Co.*, 4 B. & Ad. 315; *D'Arcy v. Tamar, &c. Ry. Co.*, L. R. 2 Ex. 158, 162; *Clippens Oil Co. v. Edinburgh, &c.*

Trustees, 1904, A. C. 64, 69; *Heath v. Deane*, 1905, 2 Ch. 86, 93.

(*m*) Above, p. 117.

(*n*) That he need not, *Thomson v. Miles*, Kenyon, C. J., 1 Esp. 184; that he must, *Crosby v. Percy*, Mansfield, C. J., 1 Camp. 302. Lord St. Leonards evidently thought the former the right decision; Sug. V. & P. 439.

of the deeds themselves (*o*). Under the present practice—first introduced by the Common Law Procedure Act, 1852—any litigant may call upon his adversary to admit any document, saving all just exceptions, on pain, in case of unreasonable refusal, of being ordered to pay the costs of proof (*p*). It is thought, considering the long-established practice of conveyancers not to require proof of the execution of title-deeds and the above-mentioned alterations in the law (*q*) and practice as to the proof of documents in an action, that the Court would certainly not uphold a requisition, that the vendor must prove the execution of any document of title less than thirty years old, if made without showing any reason for suspecting the authenticity of the document (*r*).

Here it should be mentioned that, whenever any title-deed has been executed by attorney, the deed (*s*) creating the power of attorney so acted upon ought to be

Title-deeds
executed by
attorney.

(*o*) *Tindal, C. J., Laythorpe v. Bryant*, 1 Bing. N. C. 421, 427. The decision there was, that in the absence of any such communications as might establish the admission of the authenticity of the deeds, a vendor suing to recover under special stipulation in the contract the amount of the loss on a re-sale of leasehold property rejected by the original purchaser, and alleging himself to have been in possession of the property under the lease, must prove this allegation by showing the execution of the lease in the usual way.

(*p*) Stat. 15 & 16 Vict. c. 76, s. 117; R. S. C. Ord. XXX. r. 2.

(*q*) Above, p. 117.

(*r*) See 1 Dart, V. & P. 312, 5th ed.; 353, 6th ed.; 348, 7th ed.

(*s*) A power of attorney authorising one to execute a deed on behalf of another is required by law to be given by deed; *Hibblewhite v. McMorine*, 6 M. & W.

200, 214, 216; *Powell v. London & Provincial Bank*, 1893, 2 Ch. 555, 558, 563, 565. At common law an attorney authorised to execute a deed was bound to execute it in the name of his principal, and not in his own name; otherwise the execution would be void; *Combes's Case*, 9 Rep. 75 a, 76 b; *Frontin v. Small*, 2 Ld. Raym. 1418; *White v. Cuyler*, 6 T. R. 176; *Wilks v. Back*, 2 East, 142; *Lawrie v. Lees*, 14 Ch. D. 249, 7 App. Cas. 19. But in deeds executed by attorney after the year 1881 the attorney might and still may (whatever were the date of the instrument creating the power) execute the deed either in his principal's name according to the common law rule or in his own name and with his own signature and seal under the authority of the Conveyancing Act of 1881, Stat. 44 & 45 Vict. c. 41, s. 46; 1 Davidson, Prec. Conv. 101, 5th ed.

abstracted and produced; and either it should be handed over to the purchaser on completion, or (if the vendor or any other person be entitled to retain it) a statutory acknowledgment and undertaking should be given for its production and safe custody (*t*). Besides this, evidence should be furnished, if necessary, that the power was not revoked by the donor's death or otherwise before it was so acted upon (*u*). Such evidence is not necessary (1) where the power was given before the year 1883 for valuable consideration, and was made exercisable in the names of the principal's representatives after his death (*x*); or (2) where the power was given by an instrument executed after the year 1882 for valuable consideration (*y*); or (3) where the power was given by an instrument executed after that year (whether for valuable consideration or not) and expressing that the power should be irrevocable for a fixed time, therein specified, not exceeding one year from the date of the instrument (*z*), and the power was acted upon within that time. But where the power was given otherwise than for valuable consideration by an instrument, wherein the power was not so expressed to be irrevocable, the purchaser may, and should, require evidence to be furnished that the power was not revoked by the donor's death or otherwise before it was acted upon (*a*).

(*t*) See *Eaton v. Sanxter*, 6 Sim. 517, 519; above, pp. 34, 47, 48.

(*u*) Sug. V. & P. 417; 1 Dart, V. & P. 311, 312, 5th ed.; 352, 353, 6th ed.; 348, 7th ed.

(*x*) See below, Chap. XII. § 5. Such a power, if not expressed to be exercisable in the names of the principal's representatives after his death, was revoked at common law by the principal's death; but relief would be given in equity against such revocation. In this case therefore it might be necessary to require evidence that the

principal was alive at the time when the power was acted upon by the attorney, in order to be satisfied that no person could set up a legal estate acquired for value without notice of the power in opposition to the estate purported to be assured by the exercise of the power.

(*y*) See Stat. 45 & 46 Vict. c. 39, s. 8; below, Chap. XII. § 5.

(*z*) See Stat. 45 & 46 Vict. c. 39, s. 9; below, Chap. XII. § 5.

(*a*) See note (*x*), above.

The documentary evidence in support of a title may be of two kinds. First, private writings which are kept in the custody of the parties interested, and which the purchaser can require to be handed over to him on completion; of this kind are the ordinary deeds of conveyance. And secondly, documents which are kept in public or official custody and to the possession of which the purchaser can have no right. Such are Acts of Parliament public or private, records, orders of proceedings of the Courts of justice, the court rolls of a manor, and wills, if proved. With regard to the latter kind of evidence, the vendor cannot require the purchaser to go and verify the abstract for himself by inspection of the original document; he is bound to produce, at the proper place for verification of the abstract, such evidence of any document in public or official custody as it is the practice for conveyancers to accept; and the purchaser will be entitled *prima facie* to have this evidence delivered over to him on completion (*b*). At common law, the vendor had to bear all the expense of procuring any such evidence (*c*). But under the Conveyancing Act, 1881 (*d*), the purchaser, in the absence of stipulation to the contrary, must bear the expense of procuring all such evidence, if not in the vendor's possession. The vendor, however, is not released from the obligation of procuring such evidence; he is merely exonerated from the expense of discharging it.

Documents of title may be in private or official custody.

Vendor must produce evidence of documents in official custody.

Expense of proving documents not in vendor's possession.

Here it may be mentioned that, in litigation, the contents of any public document may be proved, at common law, either by production of the original document or its equivalent, or by an examined copy,

Evidence of public document.

(*b*) *Halkett v. Dudley*, 1907, 1 Ch. 590, 603, 604.

(*c*) Sug. V. & P. 431, 448; 1 Dart, V. & P. 408, 5th ed.; 472,

6th ed.; 482, 7th ed.; 1 Davidson, Prec. Conv. 550, 555, 4th ed.

(*d*) Stat. 44 & 45 Viet. c. 41, s. 3 (6), (9).

that is, a copy proved by oral evidence to have been examined with the original and to correspond therewith (*e*). An exemplification, which is a copy of a record set out either under the great seal or the seal of a Court, is equivalent to the original document exemplified (*f*); and a copy made by an officer of the Court, who is *bound by law to make it*, is equivalent to an exemplification (*g*). Office copies, or copies made by an officer of the Court, who is authorised by rule of Court *but not required by law* to make them, are not at common law equivalent to an exemplification, save in the same Court *and cause*, in which the proceeding recorded occurred (*h*). But many documents of a public nature are provable under particular Acts of Parliament by copies certified as authentic under some official seal or signature or otherwise (*i*); and in such cases the certified copies are admissible in evidence if they purport to be authenticated as prescribed by law, without proof of the official stamp, seal or signature required or of the official character of the certifier (*k*). And by the Evidence Act, 1851 (*l*), whenever any book or document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Statute

(*e*) *Doe d. Gilbert v. Ross*, 7 M. & W. 102, 106, 124; Taylor, Evidence, §§ 1333, 1368, 1389 *sq.*, 5th ed.; Stephen, Evidence, Arts. 73 *sq.* The rule extends to any document or book which is of such a public nature as to be admissible in evidence on its mere production from the proper custody; *R. v. Hains*, Comb. 337; *Lynch v. Clarke*, 3 Salk. 154; *R. v. Gordon*, 2 Doug. 590, 593 and note; Taylor, Evidence, §§ 1436, 1437, 5th ed.

(*f*) Bac. Abr. Evidence (F); Taylor, Evidence, §§ 1378—1381, 5th ed.; Stephen, Evidence, Art. 77.

(*g*) *Appleton v. Lord Braybrook*,

6 M. & S. 34, 36—39; *Doe v. Lloyd*, 1 Man. & Gr. 671, 684-6; Bac. Abr. Evidence (F); Taylor, Evidence, § 1384, 5th ed.; Stephen, Evidence, Art. 77.

(*h*) Taylor, Evidence, §§ 1378—1391, 5th ed.; Stephen, Evidence, Art. 78.

(*i*) Taylor, Evidence, § 1440, 5th ed.

(*k*) Stat. 8 & 9 Vict. c. 113, s. 1; Taylor, Evidence, §§ 7, 1441, 5th ed.; Stephen, Evidence, Art. 79.

(*l*) Stat. 14 & 15 Vict. c. 99, s. 14; Taylor, Evidence, § 1437, 5th ed.; Stephen, Evidence, Art. 79.

exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence if it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted. On sales, however, it has always been the practice to receive office copies and extracts in evidence, whether the same would be admissible as evidence in litigation or not (*m*).

The proper place for verification of the abstract is either at the vendor's residence, or near the land sold, or in London (*n*). If the title-deeds be produced at any one of these places, the purchaser must, at common law, bear the expense of his solicitor's examination of them and of any journey for this purpose (*o*). The vendor may however discharge his obligation by production of all or some of the title-deeds at some other place or places: but in that case he would at common law be bound to pay any additional expense incurred by the purchaser in the examination of the deeds,

Proper place
for verifica-
tion of the
abstract.

Expense of
examining
title-deeds

(*m*) Sug. V. & P. 414, 417; 1 Dart, V. & P. 318, 5th ed.: 361, 6th ed.; 1 Davidson, Prec. Conv. 550-2, 4th ed.; *Halkett v. Dudley*, 1907, 1 Ch. 590, 603, 604. It should be noted that proof of a public document by what is called an examined copy is not available on sales, as the admissibility in evidence of such a copy depends on the statements made on oath in Court of the person who examined the copy with the original; *Cracford Passage*, 2 H. L. C. 544-5; Taylor, Evidence, § 1389, 5th ed. And an attested copy, that is a copy endorsed with a written and signed declaration that it is a true copy, is of no more use to a purchaser than an office copy, the declaration not being evidence admissible in subsequent litigation; see above, p. 122.

(*n*) If the deeds are to be examined in London, a country solicitor must employ a London agent for the purpose; and he cannot charge his client with the expense of a journey, even though undertaken at his client's request, in order to examine the deeds personally, unless he first explain to his client what is the regular practice. But a London solicitor need not employ a country solicitor as his agent to examine deeds, but may send his own clerk. See *Alsop v. Oxford*, 1 My. & K. 564; *Hughes v. Wynne*, 8 Sim. 85; *Re Tryon*, 7 Beav. 496; Sug. V. & P. 430; 1 Dart, V. & P. 407, 408, 5th ed.; 470, 471, 6th ed.; 481, 482, 7th ed.

(*o*) Sug. V. & P. 429; 1 Dart, V. & P. 407, 5th ed.; 470, 6th ed.; 481, 7th ed.; 1 Davidson, Prec. Conv. 554, 4th ed.

not in vendor's possession.

Deeds in possession of vendor's mortgagees—

or other persons than the vendor.

Mortgagor's right of access to title-deeds in possession

beyond what would have been incurred if the deeds had been produced at the proper place (*p*). But under the Conveyancing Act, 1881 (*q*), the purchaser, in the absence of stipulation to the contrary, must bear the expenses of the production and inspection of all documents, which are not in the vendor's possession, and of all journeys incidental thereto. The vendor therefore must still produce all documents of title, which are in his own possession, at the proper place for verification of the abstract; or pay the extra expense incurred by their examination elsewhere (*r*). But in the absence of stipulation to the contrary, he can produce any documents of title, which are not in his possession, at whatever place they may happen to be, without being called upon to bear any extra expense so caused. It has been held that, under the last-mentioned enactment, a purchaser must pay all the expense of the examination on his behalf of title-deeds, which are in the possession of the vendor's mortgagees, and are in consequence produced at the office of the mortgagees' solicitors; including the mortgagees' solicitors' costs of such production and examination (*s*). The purchaser must equally bear all the expense of the production and examination of any title-deeds, which are produced at the office of the solicitors to some person, by whom the vendor is entitled to require production of the deeds under some statutory acknowledgment or covenant.

Here it may be mentioned that by the Conveyancing Act of 1881, where a mortgage has been made after the 31st December, 1881, the mortgagor, as long as his

(*p*) *Sharp v. Page*, Sug. V. & P. 430; *Hughes v. Wynn*, 8 Sim. 85; 1 Dart, V. & P. 408, 5th ed.; 471, 6th ed.; 482, 7th ed.; 1 Davidson, Prec. Conv. 554, 4th ed.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 3 (6), (9).

(*r*) See 1 Davidson, Prec. Conv. 461, 5th ed.

(*s*) *Re Willett and Argenti*, 5 Times L. R. 476; 60 L. T. N. S. 735.

right to redeem subsists, is entitled from time to time, at reasonable times, on his request, and at his own costs, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee; and this enactment is to have effect, notwithstanding any stipulation to the contrary (*t*). A vendor of land, which is subject to a mortgage made after the year 1881, thus enjoys the right of access to the title-deeds for the purpose of preparing and verifying the abstract. But where the mortgage was made before the year 1882, the old rule remains in force that the mortgagee in possession of the title-deeds of the mortgaged property cannot be compelled to produce them for the inspection of the mortgagor or any one claiming through him, without being paid off (*u*). In such case therefore the vendor must arrange with the mortgagee for production of the title-deeds (*x*). With

of a mortgagee under a mortgage made after 1881.

Mortgagee's right where the mortgage was made before 1882.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 16; see also sects. 1, 2.

(*u*) *Senhouse v. Earl*, 2 Ves. sen. 450; *Postlethwaite v. Blythe*, 2 Swanst. 256, 257; *Brown v. Lockhart*, 10 Sim. 420; *Greenwood v. Rothwell*, 7 Beav. 291; *Chichester v. Donegal*, L. R. 5 Ch. 497, 502. According to these cases the rule extends to the mortgage deed itself; and the decision to the

contrary in *Patch v. Ward*, L. R. 1 Eq. 436, appears to be incorrect. Where the mortgage was made before the year 1882, the old rule applies to documents modifying the terms of but not entirely superseding and discharging the contract of mortgage and executed after the year 1881; *Burn v. London & South Wales Coal Co.*, 1890, W. N. 209.

(*x*) With respect to the concurrence of any mortgagee (whatever be the date of his mortgage) in a sale by the mortgagor of the mortgaged property (see above, p. 47), the mortgagor's right, where the mortgage is in the usual form, evidencing an intention to confer a permanent security, and the day for redemption at law is past, and the mortgagee has made no express or implied demand for repayment of the mortgage money, is to redeem on payment of the whole amount due on the mortgage for principal, interest and costs (*National Provincial Bank of England v. Games*, 31 Ch. D. 582), and either after giving six calendar months' previous notice of his intention to redeem, or on payment instead of six calendar months' interest in advance: *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 34; *Johnson v. Evans*, 1889, W. N. 95, 61 L. T. 18; *Smith v. Smith*, 1891, 3 Ch. 550, 552; *Fitzgerald's Trustee v. Mollersh*, 1892, 1 Ch. 385, 388, 389. Where the mortgagee has demanded, or has taken any legal proceedings to

Deeds, of which the vendor has a mere right to production.

Right to production under statutory acknowledgment.

regard to any title-deeds, of which a vendor of land has a mere right to production (the right to *possession* of the deeds going with other land held under the same title (*y*), or otherwise not accompanying the land sold), the question, whether he can be prejudiced by the possessor of the deeds depositing them with a mortgagee, depends on the nature of his right to production of the deeds. If the right to production arise under a statutory acknowledgment taking effect by virtue of the Conveyancing Act of 1881 (*z*), the duty of production is incumbent on and may be enforced against not only the giver of the acknowledgment, but also every other person having possession or control of the deeds from

enforce repayment of the mortgage money, or has sold or taken possession of the mortgaged property, the mortgagor is absolved from the obligation of giving notice to pay off or paying interest in lieu of notice; *Sharpnell v. Blake*, ubi sup.; *Letts v. Hutchins*, L. R. 13 Eq. 176; *Banner v. Berridge*, 18 Ch. D. 254, 279; *Re Alcock*, 23 Ch. D. 372; *Bovill v. Endle*, 1896, 1 Ch. 648. Where the just inference from the mortgage transaction is that it was intended to be temporary, as in the case of a mortgage to bankers by deposit of title-deeds, the mortgage is redeemable at any time without giving notice to pay off or paying interest in advance instead; *Fitzgerald's Trustee v. Mellersh*, 1892, 1 Ch. 385. A mortgage is not redeemable before the day fixed for redemption *at law* has arrived, not even on tender of the whole principal money with interest up to that date; *Brown v. Cole*, 14 Sim. 427; unless the mortgagee has taken steps (as by entry into possession) to enforce repayment of the mortgage money; *Bovill v. Endle*, ubi sup. And this rule applies where a mortgage is made with a proviso that the security shall remain for a certain term of years of reasonable length; *Biggs v. Hoddinott*, 1898, 2 Ch. 307, 311. As to mortgages redeemable at law on payment by instalments, see *Cummins v. Fletcher*, 14 Ch. D. 699, 702, 713, 714. A vendor of land in mortgage is of course entitled, on redemption in strict accordance with his *right*, to require the mortgagee to convey the mortgaged property to the purchaser: but if he desire the mortgagee to acquiesce in any arrangement, which he is not strictly entitled to enforce, with respect to the sale, as if he wish the mortgagee to release part of the mortgaged property from his security, either on payment of part of the mortgage money or without payment, or to waive the right (where given) to have the security to remain for a certain term, he must come to an agreement with the mortgagee, or he will be unable to enforce the contract of sale; see below, Chap. V.; Chap. XII. § 3.

(*y*) See above, p. 47.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 9; see sub-ss. 1, 2. The statutory undertaking for safe custody

is equally enforceable against the undertaker and every person having possession or control of the documents from time to time; sub-s. 9.

time to time. Production of the deeds may therefore be enforced when they are in the custody of mortgagees or purchasers from the giver of the acknowledgment; and it is immaterial whether the mortgagee or purchaser had notice of the acknowledgment or not. If however the vendor have only an equitable right to production of the deeds, such as appears to arise without express agreement when land held under one title or the estate therein is severed, and the right to the custody of the deeds goes with some particular part of the land or estate (*a*), it seems that he may lose the benefit of such right in case the land or estate, to which the possession of the deeds is incident, be conveyed (together with the deeds) to a purchaser or mortgagee, who had no notice of the equitable obligation to produce the deeds (*b*). And it seems that this is equally the case, where the vendor has the benefit of a covenant to produce the deeds, but the landowner in possession of them has conveyed his land with the deeds to a purchaser or mortgagee having no notice of the covenant; for it is now considered that the burthen of a covenant to produce title-deeds does not run *at law* with the land, to the ownership of which the possession of the deeds is incident. But where a mortgagee or purchaser has taken the land with notice of an equitable right to production of the title-deeds, it is thought that he would be bound to give effect to it (*c*).

Where the vendor has a mere equitable right of production.

Where the vendor has a covenant for production of the deeds.

(*a*) See below, Chap. XII. § 3.

(*b*) See below, Chap. XII. § 3; *Wallwyn v. Lee*, 9 Ves. 24; *Lambert v. Rogers*, 2 Mer. 489; *Henth v. Crealock*, L. R. 10 Ch. 22, 32, 33, 35. With respect to the rule affirmed in the last case that a Court of Equity will not interfere to deprive a purchaser for value of the possession of title-deeds acquired in good faith and without notice of a superior right (whether legal or equitable) thereto, note the difference under

the present law where a *legal* right to the possession of deeds is sought to be enforced in the Chancery Division: *Re Cooper*, 20 Ch. D. 611; *Re Ingham*, 1893, 1 Ch. 352, 361.

(*c*) See below, Chap. XII. § 3. In any case in which the liability to produce a title-deed is really incident to the legal estate in some land, a purchaser or mortgagee is of course affected by it. Thus the assignee of a lease, whether by way of sale, mort-

Solicitor's
lien.

When a man's title-deeds are in the custody of his solicitor, who has the regular solicitor's lien thereon for the general balance owing of his account (*d*), the solicitor has the right to refuse inspection or production of the deeds, as well as to keep them in his possession until his account is paid; and he can assert this right as against all persons who may subsequently become purchasers or mortgagees of the land to which the deeds relate (*e*). But where a solicitor, who has a lien on his client's title-deeds, is instructed to act for the client in the matter of a sale proposed or agreed upon of the land, to which the deeds relate, it is his duty, if he intend to assert his lien as a bar to the production or delivery of the deeds to the purchaser, to call his client's attention thereto (*f*); and it is thought that if he should omit to do this, he would be taken to have waived his right to obstruct the sale by refusing to allow the purchaser to inspect the deeds (*g*). But it does not appear that the mere omission of the solicitor to call his client's attention to his lien before undertaking the business of the sale, would prevent him from asserting his lien as a bar to the delivery of the title-deeds to the purchaser on completion (*g*); and if he should hand over the

Solicitor,
having a lien
on a vendor's
deeds, in-
structed to
act for him
in the sale.

gage or otherwise, is bound to produce the lease in aid of the lessor suing him on some covenant contained therein; *Balls v. Musgrave*, 3 Beav. 448, 4 Beav. 119.

(*d*) *Expte. Sterling*, 16 Ves. 258; *Stevenson v. Blacklock*, 1 M. & S. 535; *Re Morris*, 1908, 1 K. B. 473.

(*e*) *Lord v. Wormleighton*, Jac. 580, 582; *Cottenham, C., Bozon v. Bolland*, 4 My. & Cr. 354, 358; *Sugden, Ir. C., Blunden v. Desart*, 2 Dru. & War. 405, 418, 420, 421, 425-431; *Pelly v. Wathen*, 1 De G. M. & G. 16, 23; *Re Faithfull*, L. R. 6 Eq. 325; *Re Biggs and Roche* (1897), 41 Sol. J. 277; *Vaughan Williams*, L. J.,

Re Hawkes, 1898, 2 Ch. 1, 24, 25; *Neville, J., Re Rapid Road Transit Co.*, 1909, 1 Ch. 96, 99 sq.

(*f*) *Re Safety Explosives, Ltd.*, 1904, 1 Ch. 226, 231, 234, 235, 237, 238.

(*g*) This appears to follow from the principles laid down in the cases deciding that, where a solicitor, who has undertaken to act for his client in some action or proceeding, discharges himself before it is completed, he must give up all documents received from his client in the course of the proceedings to the new solicitor chosen by his client to be inspected or produced for the purposes of the proceedings, but to be held by the new solicitor

deeds to the purchaser, without making any arrangement with his client for satisfaction of what is due to him out of the purchase money or otherwise, he would lose all the benefit of his lien (*h*). If a solicitor having a lien on the vendor's title-deeds agree to act for the purchaser as well as for the vendor in the matter of the sale, it is thought that, unless he expressly reserve his lien by agreement with the purchaser, he cannot assert it in opposition to the duty, which he has undertaken on the purchaser's behalf, of procuring inspection of the deeds for verification of the abstract and delivery thereof to the purchaser on completion (*i*). A solicitor's lien cannot be asserted against any right to production or delivery up of the deeds which is paramount to his client's right to withhold or retain them (*k*). Thus if title-deeds be in the possession of a mortgagee, whose solicitors have them in their custody and so acquire a lien thereon, they cannot withhold the deeds from the mortgagor claiming either to have the deeds delivered up to him on payment of all moneys due under the mortgage (*l*), or to inspect the deeds by virtue of his right under the Conveyancing Act of 1881 (*m*). So where a mortgagor is allowed to keep the title-deeds for a while and his solicitor so acquires (since the mortgage) a lien thereon, the solicitor cannot resist the mortgagee's

Where the solicitor acts for both vendor and purchaser.

Solicitor's lien is commensurate with his client's right to withhold the deeds.

subject to the old solicitor's lien thereon : *Colegrave v. Manley*, T. & R. 400 ; *Heslop v. Metcalfe*, 8 Sim. 622, 3 My. & Cr. 183, 189 ; *Griffiths v. Griffiths*, 2 Hare, 587, 590, 592 ; *Robins v. Goldingham*, L. R. 13 Eq. 442 ; *Re Hawkes*, 1898, 1 Ch. 1, 18-20, 25, 26 ; *Re Rapid Road Transit Co.*, 1909, 1 Ch. 96, 99 : see also the cases cited in the two previous notes.

(*h*) *Re Safety Explosives, Ltd.*, *ubi sup.*

(*i*) See *Hicks v. Kent*, 3 Jur. 1024 ; *Re Mosely*, 15 W. R. 975 ; *Re Snell*, 6 Ch. D. 105 ; *Re Mason*

and *Taylor*, 10 Ch. D. 729 ; *Macfarlane v. Lister*, 37 Ch. D. 88, 94 ; *Branton v. Electrical Engineering Corp.*, 1892, 1 Ch. 434, 439 : all cases of solicitors acting both for mortgagor and mortgagee.

(*k*) *Blunden v. Desert*, 2 Dru. & War. 405, 418, 419 ; *Pelly v. Wathen*, 1 De G. M. & G. 16, 23, 24 ; *Re Hawkes*, 1898, 2 Ch. 1, 7, 13.

(*l*) *Wakefield v. Newbon*, 6 Q. B. 276 ; *Re Howellin*, 1891, 3 Ch. 145.

(*m*) Above, p. 125.

paramount right to recover possession of the deeds (*n*). And the solicitor of a tenant for life in possession of title-deeds cannot assert his lien thereon after his client's death against the remainderman claiming to have the deeds delivered up to him (*o*). Also, if a solicitor have a lien on his client's title-deeds, and the client subsequently make some sale or mortgage of the land without disturbing the lien (the deeds remaining in the solicitor's possession by virtue thereof), the lien can only be asserted as a security for costs incurred before the date of the sale or mortgage, and not for any costs afterwards incurred against the vendor or mortgagor (*p*).

Stamps.

In connection with the production of the abstracted documents, we may mention that the purchaser is entitled to require that every document, on which the proof of the title to the lands sold depends, shall be so stamped, if necessary, as to be available as evidence in a court of justice; insufficiently stamped documents not being, as a rule, receivable in evidence except on payment of a penalty (*q*). If therefore any such document, which is required by law to be stamped, be unstamped or insufficiently stamped, the vendor is bound to procure it to be properly stamped at his own expense; and the purchaser should require him to do so (*r*). In consequence of this liability, vendors often specially stipulated, where necessary, that it should be no objection to the title that any abstracted document appeared to be unstamped or insufficiently stamped, and that the purchaser should bear the expense of procuring

(*n*) *Smith v. Chichester*, 2 Dru. & War. 393; *Pelly v. Wathen*, 1 De G. M. & G. 16.

(*o*) *Davies v. Vernon*, 6 Q. B. 443, 447.

(*p*) *Blunden v. Desart*, 2 Dru. & War. 405, 420, 421, 427-431.

(*q*) See Stat. 54 & 55 Vict. c. 39, ss. 14, 15, replacing 33 & 34 Vict.

c. 97, ss. 15-17, and 17 & 18 Vict. c. 125, ss. 28, 29; Sug. V. & P. 566.

(*r*) *Whiting to Loomes*, 14 Ch. D. 822; 17 Ch. D. 10; *Re Lovell and Collard's Contract*, 1907, 1 Ch. 249; above, p. 45; for a distinction, see *Expte. Birkbeck Freehold Land Society*, 24 Ch. D. 119.

any such document to be duly stamped. But it is now enacted ^(s) that every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the 16th day of May, 1888, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void. So that if any such special stipulation be now made, it must be limited to instruments executed before or on that day ^(t). Such stipulations should not of course be made unless there be reason to suppose that some document of title is insufficiently stamped.

With regard to the evidence necessary to prove the facts as distinct from the documents stated in an abstract, what a purchaser requires is testimony reduced to writing so that it may be preserved as a muniment of title. So far as the facts may be proved by written evidence admissible in a court of justice, a purchaser is entitled to call for such evidence, if it can be obtained. But if none such can be procured, he must accept other evidence such as it is the established practice to receive on sales. For example, in the matters of pedigree, to prove the facts of birth, marriage and death the purchaser is in the first instance entitled to require certificates of baptism or birth, of marriage and of burial: but if these cannot be found, the vendor may not only have recourse to other evidence admissible in litigation, as statements of deceased members of the family or entries in a family Bible or register, but in default of such testimony he may proffer statutory declarations of living members of the family or even of strangers.

Evidence of facts required on sales.

^(s) Stat. 54 & 55 Vict. c. 39, s. 117, replacing 51 & 52 Vict. c. 8, s. 20.

^(t) 1 Key & Elphinstone, Prec. Conv. 255, 263, 4th ed.: 240, 251, 8th ed.; see above, p. 78.

The written declaration of a living member of the family as to a matter of pedigree may become good evidence after his death, but is inadmissible in court in his lifetime; whilst the like declaration of a stranger can never be evidence admissible in litigation (*u*): but on sales such declarations are nevertheless received (*x*).

Evidence that certain events, which would certainly have affected the title, did not happen.

The purchaser is entitled, pursuant to his right to require proof of all facts material to the title, to call for evidence, not only that the events stated in the abstract took place, but also that other events, of which the occurrence must necessarily have affected the title, did not happen. That an event did not happen is in many cases a matter of inference rather than of positive proof: but if the event be such that its occurrence must necessarily have rendered the title different from that stated, the purchaser is entitled to require some evidence from which its absence may reasonably be inferred. For example, if it were stated in the abstract that A., a former owner, died leaving B., his only sister, his heiress-at-law, evidence must be given, not only that A. died on the date specified, that his father died before him, and that B. was the child of the same parents as A., but also that A. died intestate, that he left no issue, that he left no brother or any issue of any brother surviving him and that he had no other sister. The production of letters of administration is the evidence usually required on sales in proof of intestacy; facts like the want of issue or the number of children born of a marriage can only be inferred, after the death of the husband and wife, from a declaration by some member of the family or familiar friend that he never knew or heard of there being any issue, or more than certain specified children of the marriage; and such declarations

(*u*) See Stephen, Evidence, Arts. 25, 31.

(*x*) Sug. V. & P. 418; 1 Dart, V. & P. 347, 5th ed.; 393, 6th ed.; 388, 7th ed.

are the evidence usually obtained (*y*). So where title was made under a voluntary settlement executed in 1845 on trust for the settlor for life and afterwards on trust for sale, but with a power of revocation, and under a conveyance after the settlor's death in execution of the trust for sale, it was admitted that the purchaser was entitled to proof, first, that the voluntary settlement had not been avoided by a subsequent conveyance for value, and secondly, that the power of revocation had never been exercised. But it was held that, there having been long possession in accordance with the alleged title, sufficient evidence was afforded by a declaration of the settlor's solicitor that he believed that the property remained in the settlor's possession till his death, and that he (the solicitor) had never heard of any sale of the property or of any exercise of the power of revocation (*z*). And it was further considered that, apart from this declaration, the necessary evidence was afforded by a recital in the conveyance made after the settlor's death that the property had been sold by auction pursuant to the trust for sale; the truth of which the purchaser was bound to assume under the stipulation making recitals in deeds twenty years old *prima facie* evidence of the facts recited (*a*). This case appears to show that, whenever a power of appointment has been created, and title is deduced as in default of appointment, the purchaser is entitled to require evidence from which it may reasonably be inferred that the power was never exercised. But where the cesser of a power, as by the death of the donee thereof, is clearly shown, long possession and conveyance for value under the title in default of

(*y*) See *Doe d. Banning v. Griffin*, 15 East, 293, 294, n.; *Greaves v. Greenwood*, 2 Ex. D. 289; *Re Jackson*, 1907, 2 Ch. 354.

(*z*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19.

(*a*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19; see below, p. 136.

appointment are of themselves facts raising a presumption that the power was never exercised; and it seems that, in such circumstances, the purchaser must allow due weight to this presumption, and cannot require other evidence beyond what is in the vendor's possession or power or is afforded by his statutory declaration (*b*).

Rule as to
presumptions
of fact.

Here we may state the general rule with respect to presumptions of matters of fact on sales; which is, that the purchaser is bound to presume whatever a judge would at law direct the jury to presume, but not matters which the judge would leave to the jury to pronounce on the effect of the evidence (*c*). For example, a purchaser may be required to presume, after long possession of lands in accordance with the beneficial title, that some bare legal estate, which was previously outstanding and ought to have been assured to the beneficiaries, was duly conveyed to them, although no such conveyance can be found (*d*). But the Court will not oblige a purchaser, who has notice of some equitable incumbrance affecting the property sold, to take a title depending on the fact that the vendor bought without notice of such incumbrance (*e*).

Events of
which the
happening
may or may
not have
affected the
title.

Besides events, which would certainly affect the title, if they occurred, there are other events, the happening of which might or might not affect the title.

(*b*) 1 Dart, V. & P. 328, 329, 5th ed.; 372, 373, 6th ed.; 366, 367, 7th ed.

(*c*) *Hillary v. Waller*, 12 Ves. 239, 254, 270; *Emery v. Grocock*, 6 Madd. 54, 57; Sugr. V. & P. 399; 1 Dart, V. & P. 327, 333, 5th ed.; 371, 377, 6th ed.; 365, 371, 7th ed.; Fry, Sp. Perf. §§ 890, 891.

(*d*) See *England d. Syburn v. Slade*, 4 T. R. 682; *Doc d. Bower-*

man v. Sybourn, 7 T. R. 2; *Wilson v. Allen*, 1 J. & W. 611, 620; *Cooke v. Soltan*, 2 S. & S. 154; *Chippens Oil Co. v. Edinburgh, &c. Trustees*, 1904, A. C. 64; and cases cited in previous note; Taylor on Evidence, §§ 113-121, 5th ed.

(*e*) *Freer v. Hesse*, 4 De G. M. & G. 495; *Nottingham Patent Brick and Tile Co. v. Butler*, 16 Q. B. D. 778, 787, 789, 790.

An instance of this is the marriage of a vendor since the conveyance of the property to him or her, when a marriage settlement may or may not have been made, and, if made, may or may not have affected the property sold. It is conceived that the vendor is, as a rule, bound to answer all questions relevant to the abstracted title, that is, the title he is offering for the purchaser's acceptance (*f*); and he must therefore answer the question whether a particular event, which might or might not have affected the title, has happened. If the answer be that the event has not happened, it does not appear that the purchaser can in general require any further evidence: though it seems he may call upon the vendor to make (at the purchaser's expense, according to the present rule (*g*)) a statutory declaration of the fact. If the vendor reply that the event happened but did not affect the property sold, the purchaser may require this statement to be confirmed by the production of any evidence in the vendor's possession or power, as well as to be embodied in a statutory declaration: but he cannot, it seems, insist on the production of other evidence (*h*). If the

(*f*) Sug. V. & P. 415, 416; 1 Dart. V. & P. 328, 329, 5th ed.; 372, 373, 6th ed.; 366, 367, 7th ed. It is submitted that the case of *Re Ford and Hill*, 10 Ch. D. 365, contains nothing contrary to this proposition. It was there held that a vendor is not bound to answer the requisition: Is there to the knowledge of the vendor or his solicitor any settlement, deed, fact, omission or any incumbrance affecting the property not disclosed by the abstract? The Court considered that such a requisition is in fact an interrogatory searching into matters beyond the vendor's duty of furnishing and verifying an abstract of title. Considering the established practice of not abstracting purely equitable charges

(above, pp. 110-112), it seems obvious that this is a correct view. The vendor in delivering an abstract offers the abstracted title as a good title; and if it appears so to the purchaser's advisers, it seems not unreasonable to preclude them from requiring the vendor to set forth generally whatever else he may know about the title. But to require him to answer all questions relevant to the *abstracted* title is an entirely different thing; that does not go beyond requiring him to prove the title which he offers.

(*g*) Above, p. 116.

(*h*) 1 Dart, V. & P. 328, 329, 5th ed.; 372, 373, 6th ed.; 366, 367, 7th ed.

purchaser be informed of the existence of a document, such as a vendor's marriage settlement, which may or may not affect the property sold, and is also told that it did not affect the property sold, he is not fixed with notice of any equitable interest created by the document in the property sold (*i*). But as this is no protection to the purchaser against any legal estate or interest limited by such document in the property purchased, he should of course require the document, if in the vendor's possession or power, to be produced for his solicitor's examination (*k*).

Expense of
proof of
facts.

At common law the vendor was bound to procure at his own expense the evidence necessary to prove all the facts stated in the abstract (*l*): but under the Conveyancing Act, 1881 (*m*), the purchaser, in the absence of stipulation to the contrary, has to bear the expenses of searching for and procuring all such evidence, which is not in the vendor's possession. As has been previously remarked (*n*), this enactment does not discharge the vendor from his obligation of procuring proper evidence of the facts, if he have not any evidence in his possession; it merely exonerates him from the expense of so doing.

Recitals and
statements in
documents
twenty years
old.

There are, however, certain facts, of which a purchaser is not entitled (except by special stipulation) to require proof, unless he can show ground for discrediting the statements in the abstract. Under the Vendor and Purchaser Act, 1874 (*o*), it is a term of every contract

(*i*) *Jones v. Smith*, 1 Ph. 244, 253; *English and Scottish Mercantile Investment Co. v. Brunton*, 1892, 2 Q. B. 1, 700.

(*k*) 2 Dart, V. & P. 876, 5th ed.; 986, 6th ed.; 895, 7th ed. The purchaser cannot require any

abstract or copy of such document to be made.

(*l*) Sug. V. & P. 417, 420, 431.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 3 (6, 9).

(*n*) Above, p. 124.

(*o*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 2). It had been usual for several years previously for vendors to make special stipulations to the same effect: *Juridical Society Papers*, ii. 589 *sq.*; 1 Davidson, *PREC. CONV.* 556, 609, 4th ed.; 1 Dart, V. & P. 147, 148, 5th ed.;

of sale of land, in the absence of stipulation to the contrary, that recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions (*p*). And by the Conveyancing Act of 1881 (*q*), the purchaser is required to

Recitals of documents forming part

Williams, Real Prop. 451, 13th ed. The old practice of conveyancers, in the absence of special stipulation, was to dispense with evidence of facts recited in deeds upwards of thirty years old, when there had been uninterrupted possession in accordance with the recitals, and under the deeds containing them, and where there were corroborative circumstances strengthening the presumption that the facts agreed with the recitals: 1 Jarm. Conv. 3rd ed. by Sweet, 121; Coventry, Conv. Ev. 317; see *Fort v. Clarke*, 1 Russ. 601.

(*p*) In *Bolton v. London School Board*, 7 Ch. D. 766, Malins, V.-C., decided that a recital that *S. Walker*, a former owner of land contracted to be sold, was seised thereof in fee simple, contained in a deed dated twenty-five years before the contract, was by the above enactment rendered evidence that *S. Walker* was so seised until the contrary were shown by the purchaser, and that the vendors were therefore discharged from the obligation of showing a forty years' title. It is submitted that this decision is clearly wrong. First, the law, as we have seen, allows a vendor to discharge his obligation of showing a good title by proof of forty years' title, that is, of forty years' seisin in fee by himself and his predecessors in title; above, p. 107. How can this obligation be possibly discharged by proof that one of such predecessors was seised in fee twenty-five years before the contract? Secondly, assuming that the recital must be accepted as evidence of the fact stated, it apparently alleged nothing but a seisin in fee and made no assertion that the land was free from incumbrances (see *Nott v. Ruccard*, 22 Beav. 307). Mere seisin in fee is perfectly compatible with the existence of a long term of years granted to other persons at a nominal rent to secure either their beneficial occupation or money advanced; and it seems that on this ground the purchaser was plainly entitled to forty years' title, the very object of allowing the investigation of title for forty years past being to enable the purchaser to ascertain, on an inspection of *all* the transactions during that period, that no incumbrances have been created which hinder the vendor from conveying what he contracted to sell. Besides, no one would contend that a vendor shows a forty years' title if he begin the abstract with a deed of conveyance, twenty-five years old, expressly limiting the land to one of his predecessors in fee; and it seems utterly absurd, if this be so, that a mere recital, in the same deed, of the grantor's seisin in fee should avail to deprive the purchaser of his right to investigate the earlier title. In *Re Wallis and Grout's Contract*, 1906, 2 Ch. 206, 210, the reasons here given (as stated in the first edition of this book, p. 109) were approved of by Swinfen Eady, J., who expressed his concurrence in the writer's conclusion.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 3 (3).

of the title prior to the time for commencing the abstract.

assume, unless the contrary appear, that the recitals contained in the abstracted instruments of any deed, will or other document forming part of the title prior to the time prescribed by law or stipulated for commencement of title, are correct and give all the material contents of the deed, will or other documents so recited, and that every document so recited was duly executed by all necessary parties and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise.

Recitals no evidence as a rule.

As a rule, recitals and other statements in deeds are no evidence at all of the facts recited (*r*), and are only available as evidence in courts of justice either by way of estoppel at law (*s*) or as admissions (*t*) of a party (*u*) who executed the deed (*x*). They may therefore be evidence against but not for a party to the deed (*x*). But owing to the exceptional rule regarding the admission in evidence of statements made *ante litem motam* by a deceased member of a family on matters of pedigree, statements on such matters so made by way of recital in a deed executed by such a person may be received in evidence after his death (*y*). The only instance of a recital affording good evidence for all purposes is a recital in a public (*z*) Act of Parliament.

Recital in a public statute

(*r*) *Bristow v. Cormican*, 3 App. Cas. 641, 653, 662.

(*s*) *Baker v. Dewey*, 1 B. & C. 704; *Harding v. Ambler*, 3 M. & W. 279; and see 8 M. & W. 212. This kind of estoppel by deed has become comparatively unimportant since law and equity have been administered in the same Courts under the Judicature Acts of 1873-5, as there was no such estoppel in Courts of Equity; *Coppin v. Coppin*, 2 P. W. 291; *Wilson v. Keating*, 28 L. J. Ch. 895.

(*t*) *Carpenter v. Buller*, 8 M. & W. 209; *Taylor*, Evidence, §§ 84,

85, 653 *sq.*, 5th ed.; *Stephen*, Evidence, Arts. 15 *sq.*

(*u*) *Fort v. Clarke*, 1 Russ. 601.

(*v*) *Tull v. Owen*, 4 Y. & C. 192.

(*x*) *Doe d. Pritchard v. Dodd*, 2 Nev. & Man. 838, 845; *Re Holland*, 1902, 2 Ch. 360, 379, 380.

(*y*) *Welcome v. Upton*, 6 M. & W. 536, 539; *Doe d. Jenkins v. Davies*, 10 Q. B. 314.

(*z*) A recital in a private Act of Parliament is not, as a rule, evidence of the fact recited: *Brett v. Beales*, M. & M. 421; *Beaufort v. Smith*, 4 Ex. 450; *The Shrewsbury Peerage*, 7 H. L. C. 1; *Cowell v. Chambers*, 21 Beav. 619.

This is held to be admissible, though not conclusive (*a*) proof of the facts recited, on the ground that it is not to be supposed that a statute, which is made by the sovereign authority of the realm, would contain an untrue statement (*b*). Statements of fact contained in what are called public documents are admissible as evidence of the facts so stated; and for this purpose public documents are those made by some public officer in pursuance of a judicial or *quasi*-judicial duty to inquire as to the facts and either for the purpose of the public (*c*) making use of and having access to the documents, or for the information of the Crown in some matter which affects the property or revenues of the Crown, and is thus a matter of public interest (*d*).

Statements of fact in public documents.

(*a*) *R. v. Greene*, 6 A. & E. 548.

(*b*) Co. Litt. 19 b; *R. v. De Berenger*, 3 M. & S. 67, 69; *R. v. Sutton*, 4 M. & S. 532, 542.

(*c*) It appears that the officer need not be an officer of the Crown, and the document need

not be made for the information of all the King's subjects, but may be public if made for the use of some class of them: see Blackburn, L. A., *Sturla v. Freccia*, 5 App. Cas. 623, 643, 644; Taylor, Evidence, §§ 1429-1433, 5th ed.

(*d*) *Rouge v. Brenton*, 8 B. & C. 732, 743, 744 (caption of seisin to the use of the Duke of Cornwall by persons assigned by him to do so admitted on the ground of the interest of the Crown and therefore of the public in the Duchy and its revenues); *Evans v. Taylor*, 7 A. & E. 617 (statements contained in a survey, which was made under statutory authority, but relating to matters outside the scope of the duty of inquiry, rejected); *Irish Society v. Bishop of Derry*, 12 Cl. & Fin. 641, 668, 669 (entry in one of the books of the First Fruits Office received); *Shrewsbury Peerage Case*, 7 H. L. C. 1, 20, 21, 24, 25 (books from the Heralds' College admissible, if containing information obtained on the Heralds' visitations, but otherwise not; see 5 App. Cas. 644, 645); *Queen's Proctor v. Fry*, 4 P. D. 230 (records of marriages and baptisms kept by order of the Government of India receivable); *Manchester Corporation v. Lyons*, 22 Ch. D. 287, 299 (inquisition as to manorial rights directed to justices of the Duke of Lancaster at a time when he had sovereign rights in the Duchy, admitted); *Sturla v. Freccia*, 5 App. Cas. 623, 643, 644 (statements as to the place of birth and the age of one Mangini contained in the report of a committee of a public department of a foreign state, directed to inquire as to his fitness for a diplomatic post, rejected, and a general rule laid down by Lord Blackburn); *Neill v. Devonshire*, 8 App. Cas. 135, 183-186 (inquisitions on attainder and *post mortem* admitted, also the decree in a possessory suit in the Irish Court of Chancery); *Evans v. Merthyr Tydfil, &c. Council*, 1899, 1 Ch. 241, 250, 252 (survey of Crown lands made in pursuance of a statutory duty, admitted); *Lyell v. Kennedy*, 14 App. Cas. 437 (extracts from parish registers kept under public authority in Scotland, received);

Statutory
declarations.

Statutory declarations of a member of the family as to matters of pedigree are admissible in evidence after the deponent's death, if they were made before any controversy had arisen as to the facts deposed to (*e*). But with this exception, statutory declarations as to matters of title are not admissible as evidence in litigation (*f*), unless against the deponent, or his privies in estate, blood or law as an admission by him (*g*), or after the deponent's death as a statement (if so made) either against his pecuniary or proprietary interest, or in the course of his business or professional duty, or as to public or general rights (*h*). A recital of a document in a deed operates as an admission of the existence and due execution of the recited document by a party to the deed containing the recital, who has executed and taken some benefit under the deed (*i*): but such a recital is not, generally speaking, any evidence of the existence or execution of the recited document, or of its contents, as against other persons (*k*). And

Recitals in
deeds of other
documents—

Re Goodrich, 1904, P. 138 (entry in a register of births made under Stat. 6 & 7 Will. 4, c. 86, admitted as evidence of the actual date of birth); *Mercer v. Denn*, 1904, 2 Ch. 534, 541, 544-546; 1905, 2 Ch. 538, 555-558, 561, 564, 568 (reports made in 1610 by a surveyor by order of the Lord Warden of the Cinque Ports as to repairs made necessary to Walmer Castle by encroachments of the sea, and an estimate made by King's engineer for reparation of Walmer Castle, all produced from the Record Office, and maps and plans prepared by direction of the Board of Ordnance in 1641, 1644 and 1647 and produced from the War Office, rejected as having been made for private information and temporary purposes; chart made by a private person, but in possession of the Admiralty, rejected; charts made by direction of the Admiralty for the use of the navy and merchants, admitted; and Lord Blackburn's rule in *Sturta v. Freccia* discussed); and see Taylor, Evidence, §§ 1429-1433, 5th ed.; Stephen, Evidence, Art. 34.

(*e*) *Berkeley Peerage Case*, 4 Camp. 401; *Reilly v. Fitzgerald*, Dru. 122; *Gee v. Ward*, 7 E. & B. 509; *Shedden v. Patrick*, 2 Swa. & Tr. 187; Sug. V. & P. 418; Hubback, Ev. Succ. 68, 69; Taylor, Evidence, §§ 571 *sq.*, 5th ed.; Stephen, Evidence, Art. 31.

(*f*) Hubback, Ev. Succ. 66, 67.

(*g*) Taylor, Evidence, §§ 653 *sq.*; 712 *sq.*, 5th ed.; Stephen,

Evidence, Arts. 15, 16.

(*h*) Taylor, Evidence, §§ 543 *sq.*; 602 *sq.*; 630 *sq.*, 5th ed.; Stephen, Evidence, Arts. 25, 27, 28, 30.

(*i*) *Burnett v. Lynch*, 5 B. & C. 589, 601; *Bringle v. Goodson*, 5 Bing. N. C. 738.

(*k*) *Montton v. Edmunds*, 1 De G. F. & J. 246, 251; Burton, Comp. pl. 480; *Re Wallis and Groul's Contract*, 1906, 2 Ch. 206.

even against parties to the deed, the recital is not evidence of any part of the contents of the recited documents, beyond what is recited (*l*). But if it has been proved that a document recited in a deed has been lost, the recital may be good secondary evidence of the lost document, when there has been long uninterrupted possession in accordance therewith (*m*).

May be evidence, if the document be lost.

Apart from the stipulation now incorporated in contracts as above mentioned (*n*) by the Vendor and Purchaser Act, 1874, and except so far as recitals or statements are evidence admissible in litigation, the vendor's obligation to furnish evidence of all facts material to the title (*o*) is in no way discharged by reason of any such facts being stated or recited in deeds or other instruments appearing on the abstract (*p*). But conveyancers can generally accept statutory declarations made on some previous sale and produced by the vendor from among the muniments of title as evidence of the facts deposed to therein; as, if there be no reason to suspect the authenticity of the declaration and the facts asserted are such as are usually proved on sales by statutory declaration, a new statutory declaration would seldom afford better evidence than an old one. And, as we have seen, in some cases an old statutory declaration may have become good evidence through the death of the deponent.

Recitals of facts do not excuse vendor from proof.

Now that the purchaser is, as a rule, bound to pay the expense of procuring all evidence necessary to verify the abstract but not in the vendor's possession (*q*), his

Acceptance of irregular evidence.

(*l*) *Gillett v. Abbott*, 7 A. & E. 783.

(*m*) *Moulton v. Edmunds*, 1 De G. F. & J. 246, 252.

(*n*) Above, p. 136.

(*o*) Above, p. 115.

(*p*) 1 Jarm. Conv. 3rd ed. by

Sweet, 120; 1 Dart, V. & P. 328, 5th ed.; 372, 6th ed.; 366, 7th ed.; Williams, Real Prop. 451, 13th ed.

(*q*) For many years before the commencement of the Conveyancing Act, 1881, it was usual

natural endeavour is to obtain satisfactory proof at the least cost to himself. Hence it frequently happens in practice that a purchaser accepts irregular evidence—evidence which he could not be required to accept—to save himself the expense of the regular mode of proof. Great caution should always be observed in admitting such proof. It is true that if any fact on which title depends be established, the purchaser may suffer no inconvenience from not having the regular conveying evidence in his possession. If he sell, the purchaser from him will by the rule be at the cost of procuring it. But if a fact admitted on irregular evidence be not verifiable by regular evidence, the purchaser may obviously find himself at serious disadvantage on a re-sale. As an example of the reception of irregular evidence, where a man's death is the fact to be proved, a purchaser may, it is conceived, usually rest satisfied with production of the probate of his will or of letters of administration to his effects (*r*), or even of the receipts for succession duty paid as on his death. Indirect evidence of this kind is often to be found in the vendor's possession, and may save the expense of getting a certificate. In this case it will be observed that the fact of death is inferred, not only from the presumption that things are rightly done (*s*), but also from the fact that the survivors have done an act against their own interest in paying death duty; and such payment and the granting of probate or administration are acts extraneous to the title. Again, the presumption that things are rightly done is greatly strengthened whenever valuable consideration has been given on the faith of certain events having taken place.

for vendors to stipulate specially that the purchaser should bear this expense; Juridical Society Papers, ii. 589, 590; 1 Davidson, *Proc. Conv.* 506, 555, 609, 4th ed.

(*r*) *Coventry, Conveyancers' Evidence*, 278, 279; *Sug. V. & P.* 418.

(*s*) *Above*, p. 118.

Thus if the death of a joint mortgagee be stated, and it appear that, on a subsequent transfer or purchase, a conveyance has been accepted from the surviving mortgagees as having become entitled in consequence of his death, it is hardly a rash assumption that the death took place as alleged. But it would not be advisable to dispense with proof of the alleged recent death of a trustee merely because in a subsequent deed a new trustee is appointed as upon his death. In this case no act extraneous to the title has been done on the faith of the event in question having occurred.

The extreme importance of the proper verification of the abstract is too often overlooked. The abstract being the chief document delivered and the only document laid before and commented on by counsel, there is always a certain danger of losing sight of the fact, that *the most perfect abstract is no evidence at all of title*. It is only when we turn away from the abstract to the verification of it that the real proof of title begins. The most severe scrutiny of the abstract may be utterly useless if the purchaser's advisers are lax in exacting or examining the evidence in support of it. Extreme care should therefore be observed in dispensing with any of the evidence regularly necessary to verify the abstract; and if it be proposed to accept any irregular or indirect evidence, the conveyancer should weigh well the reasons why the same may be regarded as affording substantial proof.

Great importance of the verification of the abstract.

It seems needless but is really very necessary to point out that no part of the verification of the abstract is more important than the examination of the title-deeds. This is especially the case at the present day, when abstracts are constantly delivered, which have been drawn in the most slovenly and unskilled manner. This fact enhances the necessity of Lord St. Leonards'

Importance of the examination of the title-deeds with the abstract.

emphatic warning, that the examination of the title-deeds with the abstract should never be left to an incompetent person (*t*). As Mr. Dart pointed out, it is a duty requiring the most scrupulous care, the object of the examination being four-fold: to ascertain, first, that what has been abstracted is correctly abstracted; secondly, that what is omitted is clearly immaterial; thirdly, that all the documents are perfect as respects execution, attestation, endorsed receipts, registration, stamps, &c.; and fourthly, that there are no endorsed notices, nor any circumstances attending the mode of execution or attestation, &c., which are calculated to excite suspicion (*u*). Every part of every document, especially of a will, should be read through (*x*). And very particular attention should be given to the execution of the documents; for, as we have seen (*y*), it is not the practice on sales to require any other evidence of the execution of the documents of title than is apparent on the documents themselves.

Proof of
identity of
property.

Besides verifying the documents and facts stated in the abstract, the vendor is bound, in the absence of special stipulation, to prove the identity of the property described in the contract for sale with that specified in the title-deeds (*z*). The requisite evidence of identity is usually obtained from ancient plans, leases, extracts from parish and land-tax books, and statutory declarations of old people (*a*). It is, however, a common stipulation in contracts for sale of land that the purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property upon the evidence afforded by a comparison of the descriptions

(*t*) Sug. V. & P. 411.

(*u*) 1 Dart, V. & P. 415, 5th ed.;
480, 6th ed.; 493, 7th ed.

(*x*) Ibid.; Sug. V. & P. 411.

(*y*) Above, p. 117.

(*z*) Above, p. 33.

(*a*) 1 Davidson, Prec. Conv.
557, 4th ed.; 463, 5th ed.

contained in the particulars of sale and in the muni-ments (*b*). This condition deprives the purchaser of his right to require independent evidence of identity: but it does not exonerate the vendor from proving identity as part of his obligation to show a good title. If therefore a comparison of the descriptions in the title deeds with the description in the contract afford no evidence that the property purchased is the same as or is part of the property to which the deeds relate, the vendor cannot force the title on the purchaser without giving further evidence of identity (*c*).

It may be convenient to consider the various matters, of which proof is generally required on sales, in alphabetical order as follows:—

Evidence of particular matters.

Acknowledgment of a deed by a married woman under stat. 3 & 4 Will. IV. c. 74:—proved, if the deed were executed before the 1st of January, 1883, by the memorandum of acknowledgment in the proper form endorsed on or written at the foot or in the margin of the deed, and an office copy of the certificate of acknowledgment (*d*), the filing of which was essential (*e*); if the deed were executed on or after the 1st of January, 1883, by a memorandum only in the proper form endorsed on or written at the foot of or in the margin of the deed and purporting to be signed by a person authorized to take the acknowledgment (*f*).

Acknowledgment.

(*b*) 1 Davidson, Prec. Conv. 610 and n., 4th ed.; 520, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 262, 4th ed.; 250, 8th ed.; above pp. 65, 72.

(*c*) *Flower v. Hartopp*, 6 Beav. 476; *Curling v. Austin*, 2 Dr. & Sm. 129; and see Sug. V. & P. 26; 1 Dart, V. & P. 153, 154, 5th ed.; 174, 175, 6th ed.; 170, 7th ed., and Chap. VI., below.

(*d*) Stats. 3 & 4 Will. IV. c. 74, ss. 84—88; 4 & 5 Will. IV. c. 92, ss. 75—79, as to Ireland; 45 & 46 Vict. c. 39, s. 7 (8).

(*e*) *Jolly v. Hancock*, 7 Ex. 824.

(*f*) Stat. 45 & 46 Vict. c. 39, s. 7, and Rules thereunder; see Williams's Conveyancing Statutes, 281, 477.

Act of Parlia-
ment.

Act of Parliament. A public Act needs no proof, the Court taking judicial notice of public Statutes (*g*). A private Act is proved by a copy thereof purporting to be printed by the King's printers (*h*), or by a copy thereof proved to have been examined with the Parliament Roll (*i*).

Award of
enfranchise-
ment.

Award of enfranchisement. If made under the Copyhold Act, 1858, proved by a copy thereof purporting to be sealed or stamped with the seal of the Copyhold Commissioners (*k*). If made under the Copyhold Act, 1887, proved in the same way or by a copy of the entry directed to be made of the award in the court rolls of the manor (*l*). The Copyhold Act, 1894 (*m*), repealed, without re-enacting, the section of the Act of 1852 (*n*) which made awards provable by such evidence in courts of justice. But similar evidence of awards of enfranchisement made under the Act of 1894 (*o*) would appear to be receivable by conveyancers on a sale.

(*g*) *R. v. Sutton*, 4 M. & S. 532, 542.

(*h*) Stat. 8 & 9 Vict. c. 113, s. 3.

(*i*) Taylor on Evidence, § 1368, vol. ii. p. 1315, 5th ed.; and see Coventry, Conveyancers' Evidence, 81; Burt. Comp. pl. 482; above, p. 122.

(*k*) After the year 1882, the Copyhold Commissioners were styled the Land Commissioners, and on the 12th August, 1889, their powers and duties were transferred to the Board of Agriculture; stats. 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2.

(*l*) See stats. 15 & 16 Vict. c. 51, s. 49; 21 & 22 Vict. c. 94, s. 10; 50 & 51 Vict. c. 73, s. 22.

(*m*) Stat. 57 & 58 Vict. c. 46, s. 100.

(*n*) Stat. 15 & 16 Vict. c. 51, s. 49.

(*o*) Under this Act, 57 & 58 Vict. c. 46, s. 10 (1), (5), enfranchisement is made by an award con-

firmed by the Board of Agriculture, who are to send a copy of the confirmed award sealed or stamped with the seal of the Board to the lord, and the lord is to "cause the copy to be entered in the court rolls of the manor." Under stat. 52 & 53 Vict. c. 30, s. 7, every document purporting to be an order, licence, or other instrument issued by the Board of Agriculture, and to be sealed with the seal of the Board, authenticated by the signature of the president or some member of the Board, or the secretary or some person authorized by the president to act on behalf of the secretary, or purporting to be signed by a secretary, or any person authorized by the president to act on behalf of the secretary, shall be received in evidence and be deemed to be such order, licence or instrument, without further proof unless the contrary is shown.

Award as to the inclosure of common lands made under an Act incorporating the Inclosure Consolidation Act, 1801, or other special Inclosure Act. Proved by a copy or extract signed by the proper officer of the Court, if the Award were enrolled in one of the Courts of Westminster, or, if the Award were enrolled with the clerk of the peace for the county in which the lands lie, by the clerk or his deputy, and purporting to be a true copy (*p*).

Award of
inclosure.

Award as to inclosure of common lands made under the General Inclosure Act, 1845. Proved by a copy purporting to be sealed with the seal of the Board of Commissioners under the Act (*q*), or by a copy or extract signed by the clerk of the peace of the county in which the lands lie, or his deputy, purporting the same to be a true copy (*r*).

Award under
General
Inclosure Act,
1845.

Bankruptcy, proceedings in. Provable in litigation in the same manner as other proceedings in *Courts* (*q.v.*), and also by copies certified as required by the various Bankruptcy Acts (*s*). Under the present Bankruptcy Act, a receiving order or an adjudication of bankruptcy is also conclusively proved by production of a copy of the *London Gazette* containing a notice thereof (*t*); the appointment of a trustee is proved by the certificate of appointment (*u*); and the proceedings at a statutory meeting of creditors are proved by a minute signed at

Bankruptcy.

(*p*) Stats. 41 Geo. III. c. 109, s. 35; 3 & 4 Will. IV. c. 87, s. 2.

(*q*) These Commissioners were first styled the Inclosure Commissioners for England and Wales; after 1882 they were styled the Land Commissioners; and on the 12th August, 1889, their powers and duties were transferred to the Board of Agriculture; stats. 8 & 9 Vict. c. 118, s. 2; 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2. See

note (*k*) to p. 146, above.

(*r*) Stat. 8 & 9 Vict. c. 118, ss. 2, 146.

(*s*) Stats. 46 & 47 Vict. c. 52, ss. 134, 137; 32 & 33 Vict. c. 71, ss. 107—109; 24 & 25 Vict. c. 134, ss. 203 *sq.*; 12 & 13 Vict. c. 106, ss. 232 *sq.*; 1 & 2 Will. IV. c. 56, s. 29; 6 Geo. IV. c. 16, s. 97.

(*t*) Stat. 46 & 47 Vict. c. 52, s. 132.

(*u*) Sect. 54 (4).

the same or the next meeting by a person describing himself as or appearing to be the chairman of the meeting at which the minute is signed (*x*). On sales, office copies are accepted as evidence, whether receivable as evidence in Court, or not (*y*).

Copyholds.

Copyholds, assurances of. The law regards the court rolls of a manor as a public document (*z*), and so permits entries therein to be proved either by production of the rolls (*a*), by examined copies (*b*) or by copies signed by the steward (*c*), such as are always delivered to the tenants on the completion of a transaction acknowledging their title (*d*). According to the strict rule of the common law, the last-mentioned mode of proof was incomplete without evidence of the steward's handwriting, unless the copy were thirty years old at least (*e*) and came from the proper custody (*f*). But entries in court rolls are provable under the Evidence Act, 1851 (*g*), by copies *purporting* to be signed and certified as true copies by the officer to whose custody the originals are entrusted, that is, as a rule, the steward. On sales of copyholds, the assurances entered on the court rolls are usually proved by copies thereof signed by the steward, and it is not the practice to require any proof of the steward's handwriting (*h*), copies purporting to be signed by the steward being accepted as genuine, unless there be some reason for

(*x*) Stat. 46 & 47 Vict. c. 52, s. 133.

(*y*) Sug. V. & P. 417; 1 Dart, V. & P. 318, 5th ed.; 361, 6th ed.

(*z*) Taylor, Evidence, §§ 1433, 1438, 5th ed.

(*a*) Doe d. Bennington v. Hall, 16 East, 208.

(*b*) Doe d. Cawthorn v. Mee, 4 B. & Ad. 617; Doe d. Burrows v. Freeman, 12 M. & W. 844; Breeze v. Hawker, 14 Sim. 350.

(*c*) 1 Scriv. Cop. 590, 3rd ed.

(*d*) Williams, Real Prop. 375, 13th ed.; 484, 21st ed.

(*e*) Above, p. 116.

(*f*) 1 Scriv. Cop. 591, 3rd ed.; 2 Wat. Cop. 39, n., 4th ed.; Wynne v. Tyrwhitt, 4 B. & Ald. 376.

(*g*) Stat. 14 & 15 Vict. c. 99, s. 14; Taylor, Evidence, §§ 1437, 1438, 5th ed.; above, p. 122.

(*h*) Sug. V. & P. 417; 1 Dart, V. & P. 310, 311, 5th ed.; 351, 6th ed.; 346, 347, 7th ed.

suspecting their authenticity (*i*). A vendor of copy-holds is as a rule bound to procure proper copies of court roll signed by the steward for verification of the abstract; he cannot require the vendor to go and compare the abstract with the original rolls (*k*): but, under the Conveyancing Act, 1881 (*l*), the purchaser will be obliged to pay the expense of obtaining such copies, if not in the vendor's possession.

Courts of justice, records and proceedings of. As a rule, these are provable in litigation (1) by production of the original, which is usually inconvenient; or (2) by an exemplification, or its equivalent; or (3) by an examined copy (*m*). As we have seen (*n*), a copy made by an officer of the Court *bound by law to make it* is equivalent to an exemplification: whilst office copies, or copies made by an officer of the Court who is authorised by rule of Court *but not required by law to make them*, are not at common law equivalent to an exemplification, save in the same Court *and cause*, in which the proceeding occurred (*n*). But office copies of all writs, records, pleadings and documents filed in the High Court of Justice are admissible in evidence to the same extent as the original (*o*). Besides the above modes of proof, there are various particular cases in which the proceedings of Courts are by Statute provable in litigation by copies certified as required by the Act (*p*). For example, proceedings in bankruptcy (*q*).

(i) See above, p. 118.

(k) Sug. V. & P. 431; 1 Dart, V. & P. 311, 5th ed.: 352, 6th ed.; 347, 7th ed., where it is submitted that the vendor will discharge his obligation, if he can produce the original rolls at the proper place for verification of the abstract, and satisfactorily account for the absence of the copies of court roll from time to time delivered to the tenants.

(l) Stat. 44 & 45 Vict. c. 41, s. 3 (6).

(m) Above, p. 122.

(n) Taylor, Evidence, §§ 1378—1391, 5th ed.; Stephen, Evidence, Art. 78.

(o) R. S. C. 1883, Order 37, rule 4.

(p) Taylor, Evidence, §§ 1391 sq., 1440, 5th ed.; Stephen, Evidence, Art. 79; above, p. 122.

(q) Stat. 46 & 47 Vict. c. 52, s. 134.

and orders in lunacy (*r*) are now provable in this way. And under the Evidence Act, 1851 (*s*), the proceedings of courts of justice not provable by copies under any other Statute appear to be provable by certified copies (*t*). The records of the Courts deposited in the Record Office are also provable as records under the charge of the Master of the Rolls (*u*). On sales, however, the practice is to accept office copies as evidence, whether the same would be receivable in evidence on litigation or not (*x*).

Crown grants. *Crown grants* are proved by production of the original under the great seal, the privy seal or the royal sign manual; but as they are matters of public record, they are also provable by exemplifications or examined copies (*y*), or under the Evidence Act, 1851, by certified copies (*z*). But on sales, if the original be not forthcoming, it seems that the purchaser cannot require the vendor to furnish him with a copy in accordance with the general rule (*a*), but must examine the enrolment at his own expense (*b*).

Deeds. *Deeds* and private writings are, as we have seen (*c*), primarily proved on sales by production of the originals, and proof of execution or signature is not usually required. If any such document, which ought to be produced, be missing, its destruction or loss must be proved, either by evidence of actual destruction, or by

Missing
documents.

(*r*) Stat. 53 Vict. c. 5, s. 144.
(*s*) Stat. 14 & 15 Vict. c. 99,
s. 14; above, p. 122.

(*t*) *Reeve v. Hodson*, 10 Hare,
App. xix.

(*u*) See below: Taylor, Evi-
dence, §§ 1337, 1338, 1377, 5th ed.

(*x*) Sug. V. & P. 417; 1 Dart,
V. & P. 318, 5th ed.; 361, 6th
ed.; 1 Davidson, Prec. Conv.
552, 4th ed.; 459, 5th ed.

(*y*) 2 Black. Comm. 346; Tay-

lor, Evidence, § 1371, p. 1316,
5th ed.; above, p. 122.

(*z*) 1 Dart, V. & P. 315, 5th ed.;
361, 6th ed.; 357, 7th ed.; above,
p. 122.

(*a*) Above, p. 121.

(*b*) Sug. V. & P. 431; 1 Dart,
V. & P. 316, 5th ed.; 359, 6th
ed.; 354, 7th ed.; 1 Davidson,
Prec. Conv. 531, 4th ed.

(*c*) Above, p. 116.

showing that search has been made for it without result in all places where it is reasonably likely to have been deposited. If its destruction or loss be so established, secondary evidence may be given of its contents (*d*), such as a counterpart, draft, copy or abstract thereof proved to be correct (*e*), or a recital thereof in a subsequent instrument (*f*): but in such case the execution of the missing document must be duly proved (*g*). A missing document will be presumed to have been duly stamped, in the absence of anything to show the contrary (*h*).

Enrolment. The proper evidence of the enrolment of any document required by Statute to be enrolled, as deeds of bargain and sale of any estate of inheritance in lands (*i*), conveyances to charitable uses (*k*) and disentailing assurances (*l*), depends generally on the terms of the particular Act. But where it is the practice to deliver back the original deed to the parties from the enrolment office with a memorandum of the enrolment endorsed thereon, and purporting to be made by the proper officer, and it is his duty to make the memorandum, such memorandum is at common law

Enrolment.

(*d*) *Hart v. Hart*, 1 Hare, 1; *Fitzwalter Peerage*, 10 Cl. & Fin. 946, 952-3; *Green v. Bailey*, 15 Sim. 542; *Richards v. Lewis*, 11 C. B. 1035; *R. v. Saffron Hill*, 1 E. & B. 93; *Moulton v. Edmonds*, 1 De G. F. & J. 246, 251; *Taylor*, Evidence, §§ 398, 399, 5th ed.; *Sug. V. & P.* 437, 438; 1 *Dart*, V. & P. 142, 312, 5th ed.; 159, 353, 6th ed.; 155, 349, 7th ed.; 1 *Davidson*, *Prec. Conv.* 551, 4th ed.

In litigation, when secondary evidence of the contents of a document is admitted, there is no question whether any particular kind of secondary evidence is better than another, and recourse may be had at once to oral evidence of the contents: *Doe d. Gilbert v.*

Ross, 7 M. & W. 102; *Taylor*, Evidence, § 495, 5th ed.; *Stephen*, Evidence, Art. 70.

(*f*) Above, p. 141; *Alexander v. Crosby*, 1 J. & L. 666.

(*g*) *Bryant v. Busk*, 4 Russ. 1; see also the authorities cited in note (*d*), above. Execution may be presumed after a long lapse of time; *Moulton v. Edmonds*, 1 De G. F. & J. 246.

(*h*) *Hart v. Hart*, 1 Hare, 1; *Taylor*, Evidence, § 127, 5th ed.

(*i*) Stat. 27 Hen. VIII. c. 16.

(*k*) Stat. 51 & 52 Vict. c. 42, s. 4, replacing 9 Geo. II. c. 36, and amended by 54 & 55 Vict. c. 73.

(*l*) Stat. 3 & 4 Will. IV. c. 74, s. 41.

sufficient evidence of the enrolment, without proof of the officer's signature or official character (*m*). This is the case with respect both to deeds of bargain and sale enrolled (*n*) and conveyances to charitable uses (*o*). And by a Statute of 1849 (*p*) it was provided that all deeds enrolled in the Petty Bag Office or in the Enrolment Office in Chancery (which include conveyances to charitable uses and disentailing assurances) should be endorsed with a certificate of enrolment under the seal of the office, and that such certificate should be sufficient *prima facie* evidence of the enrolment, and the time thereof. Since the 6th of April, 1880, the Enrolment Department of the Central Office has been the place of enrolment of all deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice; and certificates appearing to be sealed with a seal of the Central Office shall be presumed to have issued from the Central Office, and may be received in evidence without further proof of authenticity (*q*).

Exchange or
partition,
order of.

Exchange or partition, order of, under the Inclosure Act, 1845, and amending Acts (*r*), proved by a copy of the order under the seal of the Commissioners or the Board of Agriculture, according to the date of the order (*s*).

(*m*) *Doe v. Lloyd*, 1 Man. & Gr. 671, 684-5; Taylor, Evidence, § 1462, 5th ed.

(*n*) Taylor, Evidence, § 1462, 5th ed.

(*o*) *Doe v. Lloyd*, ubi sup.

(*p*) Stat. 12 & 13 Vict. c. 109, ss. 12, 18, repealed with extensive savings (see *Sayers v. Collyer*, 28 Ch. D. 103, 107; *Re R.*, 1906, 1 Ch. 730) by 56 & 57 Vict. c. 54.

(*q*) R. S. C. 1883, rr. 7, 9, replacing R. S. C. April, 1880,

rr. 45, 46.

(*r*) See stats. 8 & 9 Vict. c. 118, ss. 147, 150; 9 & 10 Vict. c. 70, ss. 9-11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14 (partition); 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, s. 5; 20 & 21 Vict. c. 31, ss. 4-11; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33.

(*s*) See above, p. 147, n. (*q*).

Fine :—proved (1) by the chirograph, that is, the indentures which were made recording the transaction and which it was the duty of the proper officer to deliver to the parties (*t*) ; (2) by an exemplification ; (3) by an examined copy (*u*) ; (4) as a record under the charge of the Master of the Rolls (*r*). Conveyancers usually received office extracts as evidence (*y*).

Lease for a year made for giving effect to a release executed before the 15th of May, 1841 :—proved, without giving any evidence of loss, by the recital or mention thereof in the release (*z*).

Pedigree, matters of. The regular conveyancing evidence that a child was born of certain parents is a certificate of baptism (*a*), that is, a certified extract from the parochial register (*b*). But a certificate of birth, which is a certified extract from the general register of births (*c*), is equally good (*d*). A certificate of baptism affords no exact evidence of a child's age, beyond that the child was born before the date of the certificate : but the Court, in pedigree cases, may look at the statements contained in such certificates, and weigh them in connection with other evidence (*e*). A

(*t*) Black. Comm. 296, 351 ; Taylor, Evidence, § 1384, 5th ed. ; *Appleton v. Braybrook*, 6 M. & S. 34, 37, 38.

(*u*) Burt. Comp. pl. 487.

(*z*) See below : Taylor, Evidence, §§ 1338, 1377, 5th ed.

(*y*) Burt. Comp. pl. 489 ; Sug. V. & P. 414 ; 1 Dart, V. & P. 315, 5th ed. ; 356, 6th ed. ; 352, 7th ed.

(*z*) Stat. 4 & 5 Vict. c. 21, s. 2. This Act was repealed by stat. 37 & 38 Vict. c. 96, but with such extensive savings that the rule enacted by s. 2 seems to be preserved, see *Sayers v. Collyer*, 28 Ch. D. 103, 107 ; *Re R.*, 1906, 1 Ch. 730 ; Dart, V. & P. 314,

5th ed. ; 356, 6th ed.

(*a*) Coventry, Conveyancers' Evidence, 278 ; Sug. V. & P. 415 ; 1 Dart, V. & P. 346, 347, 5th ed. ; 392, 6th ed. ; 386, 7th ed.

(*b*) See Taylor, Evidence, §§ 1436-8, pp. 1369-71, 5th ed.

(*c*) Established by stat. 6 & 7 Will. IV. c. 86, amended by 7 Will. IV. & 1 Vict. c. 22, and 37 & 38 Vict. c. 88.

(*d*) Above, pp. 139, n. (*d*), and 154, n. (*f*), below ; 1 Dart, V. & P. 346, 347, 5th ed. ; 392, 6th ed. ; 386, 7th ed.

(*e*) *Re Turner*, 29 Ch. D. 985, 991-2 ; Taylor, Evidence, § 1577, 5th ed.

Lease for a year.

Pedigree : birth.

Age.

Marriage.

Death.

certificate of birth, however, is evidence of the date as stated therein as well as of the fact of birth (*f*). Marriage is regularly proved by a certificate of marriage extracted from the parochial or general register; and death by a certificate of burial (*g*). And it is doubtful whether a purchaser would be compelled to accept a certificate of death as evidence of that fact, unless good reason were given for not producing a certificate of burial (*h*). Here we may observe that when the facts of birth, marriage or death have to be proved to the Court on such occasions as the payment of money out of Court, the necessary certificates must be accompanied by affidavits as to the identity of the parties named in the certificates (*i*): but it is not the practice to require similar evidence of identity on sales, unless the identity be not apparent on the face of the certificate (*k*). Extracts from non-parochial registers of birth, baptism, marriage or death, as those kept in dissenting communities, have long been received by conveyancers as evidence (*l*); and extracts from certain non-parochial registers deposited with the Registrar-General are now

(*f*) *R. v. Weaver*, L. R. 2 C. C. R. 85; *Re Goodrich*, 1904, P. 138.

(*g*) Coventry, Conveyancers' Evidence, 278; Sug. V. & P. 415; 1 Dart, V. & P. 346, 347, 5th ed.; 392, 6th ed.; 386, 7th ed.; 1 Davidson, Prec. Conv. 553, 4th ed.

(*h*) 1 Dart, V. & P. 347, 5th ed.; 392, 6th ed.; 386, 7th ed. In proceedings to obtain payment of money out of Court, if it be sought to prove death by a certificate of death and affidavit of identity, the Court will require proof of burial as well; *Riseley v. Shephard*, W. N. 1873, p. 150; 21 W. R. 782. There are previous conflicting decisions; *Leach v. Leach*, 8 Jur. 211; contra, *Parkinson v. Francis*, 15 Sim. 160.

(*i*) Dan. Ch. Pr. 591, n. (*g*). 6th ed.; Seton on Judgments, 154, 6th ed. But at law such certificates may be put in evidence without proof of identity, the question of identity being for the jury; *Hubbard v. Lees*, L. R. 1 Ex. 255, 257.

(*k*) Coventry, Conveyancers' Evidence, 278; and see Sug. V. & P. 417. From what is said in 1 Dart, V. & P. 346, 5th ed.; 392, 6th ed.; 386, 7th ed., and 1 Davidson, Prec. Conv. 553, 4th ed., 460, 5th ed., one would gather that evidence of identity was usually required: but it is submitted that on sales the practice is as above stated.

(*l*) Sug. V. & P. 418; 1 Dart, V. & P. 346, 347, 5th ed.; 392, 6th ed.; 386, 7th ed.

available as evidence in litigation (*m*). As we have seen (*n*), in the absence of the regular formal evidence of these facts, recourse is had to other means of proof; preferably, of course, to evidence admissible in litigation, such as the declarations of deceased members of the family (*o*), but in default thereof, to statutory declarations of living members of the family and even of strangers.

Where no evidence at all can be furnished in some matter of pedigree, recourse may be had to presumption, but the conveyancer must bear in mind that the rules which govern the presumption of marriage, legitimacy or death as between adverse litigants claiming some property by title of inheritance or otherwise, do not strictly apply as between vendor and purchaser (*p*). In litigation of this kind the contest is whether of the two parties can show the better right, and if the plaintiff can show a better title than the defendant (or *vice versa*), he may be entitled to succeed, notwithstanding that there may be some third party entitled to take in priority to both of them. But the title which a vendor of land is bound to show, at least under an open contract, is a title good against all other persons (*q*). The purchaser is therefore always entitled to proof of all matters of fact, which are part of or affect the title (*r*); and the vendor cannot absolve himself from the obligation of producing such evidence on the plea that, if the parties were engaged in litigation to obtain possession of the property sold, there would be a presumption dispensing

Presumption
as between
vendor and
purchaser.

(*m*) See stat. 3 & 4 Vict. c. 92, amended by 21 & 22 Vict. c. 25; Taylor, Evidence, § 1354, 5th ed.

(*n*) Above, p. 131.

(*o*) As to the evidence admissible in matters of pedigree, see Taylor, Evidence, §§ 571 *sq.*, pp. 569 *sq.*, 5th ed.; Stephen, Evidence, Art. 31; 1 Dart, V. & P. 336-351, 5th ed.; 381-397,

6th ed.; 376-386, 7th ed.

(*p*) See Sug. V. & P. 418, 421, also 404; 1 Dart, V. & P. 336, 338, 340, 343, 5th ed.; 381, 383, 385, 389, 6th ed.; 376, 378, 380, 383, 7th ed.

(*q*) See previous note.

(*r*) 1 Dart, V. & P. 328, 5th ed.; 372, 6th ed.; 368, 7th ed.

the vendor from proving the point at issue affirmatively. Besides, the rule of equity is that the vendor cannot enforce specific performance of the contract where the title shown is too doubtful in respect of some fact on which its validity depends (*s*). And even by the rule of law, where the title depends on some fact, the fact must be proved with reasonable certainty (*t*). No doubt it is true that in some cases a purchaser is obliged to accept what are called presumptions of fact: but these presumptions are really inferences or conclusions to be drawn from certain evidence produced (*u*), and not such presumptions as absolve one party to an action from giving any proof at all. And it is thought that the only rule which binds a purchaser as to these so-called presumptions of fact is that already stated, namely, that he must presume whatever a judge would at law direct a jury to presume, but cannot be required to presume any matter which the judge would leave to the jury to pronounce on the effect of the evidence (*x*). As regards death especially, where the title to land sold depends upon the fact of a death having occurred, and no evidence of the death can be procured, no legal presumption arises, in favour of the vendor and as against the purchaser, from the fact that the person, whose death is required to be established, has not been heard of for the last seven years or longer by those with whom he would naturally have communicated if alive (*y*).

No presumption of death as between vendor and purchaser.

(*s*) See below, Chap. XIX. § 3. L. R. 7 Ex. 313; Sug. V. & P.

(*t*) See *Jeakes v. White*, 6 Ex. 400, 405.

873; *Sinmons v. Heseltine*, 5 C. B. (*u*) See note (*y*), at end.

N. S. 554, 571; *Clarke v. Willott*, (*x*) Above, p. 134.

(*y*) *Coventry, Conveyancers' Evidence*, 286; Sug. V. & P. 418; 1 Dart, V. & P. 340, 5th ed.; 385, 6th ed.; 380, 7th ed. As between adverse litigants for the possession of property or in respect of other matters, there is a presumption of law that a person is dead when he has not been heard of for seven years by those with whom he would naturally have communicated, if alive, unless the circumstances be such as to account for the absence of communication without presuming death: but no presumption of law arises with respect to the time of such death (*i.e.*, that he died at any particular

As between adverse litigants, the presumptions as to marriage and legitimacy are these:—When a man and a woman have lived together as and with the reputation of being man and wife, it is presumed (unless the contrary be shown) that they were lawfully married and not living in a state of concubinage (z). And where it is established that a marriage ceremony took place, the like presumption arises in favour of the existence of every circumstance necessary to its validity (a). There is also a presumption that every child born in wedlock—that is, at any time during the continuance of the marriage between its parents, no matter how soon after the marriage ceremony (b)—is the child of the husband:

Presumption
of marriage.

Presumption
of legitimacy
or paternity.

moment of time during those years); and where a person has disappeared and has not been heard of for less than seven years, no presumption of law arises that he has since continued to live: *Nepean v. Doe*, 2 M. & W. 894; *R. v. Lumley*, L. R. 1 C. C. R. 196; *Re Phem's Trust*, L. R. 5 Ch. 139; *Re Lewes' Trusts*, L. R. 6 Ch. 356; *Re Rhodes*, 36 Ch. D. 586; *Re Aldersey*, 1905, 2 Ch. 181; Stephen, Evidence, Art. 99: see also *Prudential Assurance Co. v. Edmonds*, 2 App. Cas. 487. Also, when two or more persons meet their death in some common calamity (such as a shipwreck or a massacre), there is no presumption of law arising from age or sex that any one of them survived the other or others, neither is there any presumption of law that they died at the same time: *Underwood v. Wing*, 4 De G. M. & G. 633; *Wing v. Angrave*, 8 H. L. C. 183; *Re Alston*, 1892, P. 142; *Re Beynon*, 1901, P. 141. And there is no presumption of law that a person, who is dead, left no issue: *Re Jackson*, 1907, 2 Ch. 354. All the above-mentioned matters, as to which no presumption of law arises, must be proved positively: but the jury or other proper tribunal, to determine questions of fact, may draw an inference (often styled a presumption) of fact in respect thereof, if evidence sufficient to warrant such inference be submitted: see the cases above cited. So also where a man has disappeared in circumstances which make it likely that he has met his death, an inference of fact may be drawn that he is dead, notwithstanding that a far shorter space of time than seven years has elapsed since his disappearance: *Sillick v. Booth*, 1 Y. & C. C. C. 117; *Re Beasley's Trusts*, L. R. 7 Eq. 498; *Hickman v. Upsall*, L. R. 20 Eq. 136; *Re Alston*, ubi sup.; *Re Matthews*, 1898, P. 17; cf. *Ommaney v. Stilwell*, 23 Beav. 328. As to the difference between presumptions of law and of fact, see Taylor, Evidence, §§ 61, 62, 94-97, 169-171, 5th ed.; Stephen, Evidence, Art. 1 and note 1.

(z) *Piers v. Piers*, 2 H. L. C. 331, 362-364, 370, 371, 379, 380; *Breadalbane Case*, L. R. 1 Sc. App. 182, 199, 200; *Lyle v. Elthwood*, L. R. 19 Eq. 98, 107; *Re Shephard*, 1904, 1 Ch. 456.

(a) See cases cited in previous

note: *Harrison v. Southampton Corpn.*, 4 De G. M. & G. 137; *Sastry Velaidar Aronegary v. Sembecutty Vaigalic*, 6 App. Cas. 364.

(b) Co. Litt. 244 a; *Poulett Peerage*, 1903, A. C. 395, 398.

but this presumption may be rebutted by evidence that the husband and wife have not had sexual intercourse within such period previous to the child's birth as would be necessary to produce the gestation in question (c).

(c) *Morris v. Davies*, 5 Cl. & Fin. 163, 215, 229, n., 251, 252, 260, 262, 265; *R. v. Mansfield*, 1 Q. B. 444; *Saye & Sele Barony*, 1 H. L. C. 507, 511, 512; *Hawes v. Draeger*, 23 Ch. D. 173, 178; *Aylesford Peerage*, 11 App. Cas. 3, 17; *Bosvile v. A.-G.*, 12 P. D. 177 (appeal abandoned, 1887, W. N. 181); *Burnaby v. Baillie*, 42 Ch. D. 282, 297, 298. The question, whether such intercourse did take place, is one of fact to be proved in the ordinary way and to be decided by the jury or other proper tribunal for pronouncing on questions of fact: but clear evidence is required to rebut the presumption of legitimacy; the matter is not to be decided on a mere balance of probabilities. And after evidence tending to establish such intercourse (as that the husband and wife occupied the same bedroom) has been given, then no other evidence is admissible than such as tends to disprove the inference of the intercourse having taken place; see the cases above cited. The fact of non-intercourse may be inferred from the conduct of the husband or wife, and their statements made at the time or afterwards are admissible in evidence as part of the *res gestæ* and in proof of their conduct; *Aylesford Peerage*, 11 App. Cas. 3; *Burnaby v. Baillie*, 42 Ch. D. 282, 291. But neither of them is admissible as a witness, at the trial of the issue of the legitimacy of the child, to state whether the required intercourse took place or not; nor is any statement or declaration of either of them with regard to this matter admissible as direct evidence thereof; *R. v. Sourton*, 5 A. & E. 180; *Nottingham Guardians v. Tomkinson*, 4 C. P. D. 343; *Hawes v. Draeger*, 23 Ch. D. 173, 178; *Burnaby v. Baillie*, 42 Ch. D. 282, 293. In the second and fourth of these cases the Court declined to follow a contrary decision in *Re Yearwood's Trusts*, 5 Ch. D. 545. This rule however relates only to the proof or disproof of sexual intercourse between husband and wife during their marriage; it does not prevent either of them, on the trial of the legitimacy of a child born so soon after marriage that it must necessarily have been begotten before the marriage, from being admitted to give evidence whether such intercourse took place between them before their marriage; *Poulett Peerage*, 1903, A. C. 395, overruling *Anon. v. Anon.*, 22 Beav. 481, 23 Beav. 273. Evidence of the husband or wife is also admissible in any proceeding instituted in consequence of adultery with regard to the issue, whether adultery has taken place or not; but not, it appears, on the issue of the legitimacy of any child of the wife's; Stat. 32 & 33 Vict. c. 68, s. 3; *Hetherington v. Hetherington*, 12 P. D. 112, 114; *Evans v. Evans*, 1904, P. 378. Questions of the legitimacy of any natural-born British subject domiciled in England or Ireland or claiming any real or personal estate situate in England or of the validity of his marriage or that of his parents or grandparents may be determined in proceedings instituted in the Probate Division under the Legitimacy Declaration Act, 1858 (stat. 21 & 22 Vict. c. 93): but any decree so obtained does not prejudice any person unless he has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party, and such decree will not prejudice any person if subsequently proved to have been obtained by fraud or

This presumption arises, although the husband and wife be separated by mutual consent, and even when the wife is living in adultery with another man (*d*); and it extends to all children born within due time after the husband's death (*e*) or the dissolution of the marriage (*f*). But when the husband and wife have been separated by a decree of divorce *a mensâ et thoro*, a sentence of judicial separation or a separation order (*g*), the presumption ceases with respect to children born after the expiration of such time subsequent to the decree, sentence or order as is equal to the usual period of gestation (*h*).

Record under the charge and superintendence of the Master of the Rolls for the time being (*i*). Proved by a copy certified as true and authentic by the deputy keeper of the records, or one of the assistant record

Record in
Record Office.

collusion: s. 8. The Court has no jurisdiction to determine in such proceedings any question of the heirship of real estate; *Mansel v. A.-G.*, 2 P. D. 265. It may be noted here that no child born out of wedlock can in any circumstances inherit any real estate in England as heir to and upon the death and intestacy of any person; *Doe d. Birtchistle v. Vardell*, 5 B. & C. 438; 2 Cl. & Fin. 571; *Birtchistle v. Vardell*, 7 Cl. & Fin. 895; *Escallier v. Escallier*, 10 App. Cas. 312, 317. But where a gift is made by will, or (as it seems) by an instrument operating *inter vivos*, of any real or personal estate situate in England to the child or children of any person domiciled in some country where the law admits of legitimation *per subsequens matrimonium*, a child so legitimated may take thereunder as a lawful child of such person; *Skatton v. Young*, L. R. 11 Eq. 474; *Re Andros*, 24 Ch. D. 637; *Re Grey's Trusts*, 1892, 3 Ch. 88. It has also been held that children so legitimated may as children or next of kin succeed on intestacy to personal chattels under the Statute of Distributions (stat. 22 & 23 Car. II. c. 10); *Re Goodman's Trusts*, 17 Ch. D. 266, James & Cotton, L. J., diss. Lush, L. J., reversing Jessel, M. R. 14 Ch. D. 619. *Quere*, whether this decision applies in the case of chattels real situate in England; see *Inuncan v. Lawson*, 41 Ch. D. 394; *Pepin v. Brugère*, 1902, 1 Ch. 24.

(*d*) See cases cited in previous note and in n. (*h*), below: *Hargrave v. Hargrave*, 9 Beav. 552.

(*e*) See Co. Litt. 123 b and n. (1, 2); Bac. Abr. Bastardy (A); 1 Black. Comm. 466, 467.

(*f*) See cases cited in note (*h*), below; Bac. Abr. Bastardy (A), ed. 1832; *Evans v. Evans*, 1904, P. 274, 378, 381; Stephen, Evi-

dence, Art. 98.

(*g*) Under Stat. 58 & 59 Vict. c. 39, s. 5, replacing 41 & 42 Vict. c. 19, s. 4.

(*h*) *St. George's Parish v. St. Margaret's*, 1 Salk. 123; *Hetherington v. Hetherington*, 12 P. D. 112, 114.

(*i*) See Taylor, Evidence, §§ 1337, 1338, 5th ed.

keepers, and purporting to be sealed or stamped with the seal of the Record Office (*k*).

Recovery. *Recovery, common* :—proved by an exemplification or an examined copy (*l*) or as a record under the charge of the Master of the Rolls (*m*). Conveyancers accepted office extracts (*n*).

Registration. *Registration of assurances in Middlesex or Yorkshire* :—proved by the certificate of registration which it is the registrar's duty to indorse and sign on the registered assurance (*o*). Under the Yorkshire Registries Act, 1884, the registrar is also required to seal the certificate with the seal of the registry (*p*).

Seisin. *Seisin* :—provable on sales by extracts from the land tax or poor rate assessments showing who were the landlords and tenants of the property assessed, or by evidence of acts of ownership, as the grant of a lease under which possession was had, or any letting followed by payment of rent and *à fortiori* a sale or mort-

(*k*) Stat. 1 & 2 Vict. c. 94, ss. 1, 12, 13.

(*l*) Coventry, Conveyancers' Evidence, 77; Burt. Comp. pl. 490; 1 Dart, V. & P. 315, 5th ed.; 356, 6th ed.; 352, 7th ed.

(*m*) See above.

(*n*) Sug. V. & P. 414. By stat. 14 Geo. II. c. 20, ss. 4, 5, repealed with extensive savings (see 28 Ch. D. 107) by 30 & 31 Vict. c. 59, where an estate had been purchased and held for twenty years under a title which a recovery was necessary to complete, the purchaser and all claiming under him might prove a recovery, of which no record could be found or which appeared not to be regularly entered on record, by production of a deed making a tenant to the Præcipe

and declaring the uses of the recovery and executed by a person having a sufficient estate for the purpose; and every recovery twenty years old, to which the persons having power to bar the entail were parties, was made valid, if it appeared on the face thereof that there was a tenant to the writ, notwithstanding that the deed for making such tenant were lost or did not appear; see Burt. Comp. pl. 682-694.

(*o*) Stats. 7 Anne, c. 20, s. 6, as to Middlesex; 47 & 48 Vict. c. 54, s. 9, as to Yorkshire, replacing 2 & 3 Anne, c. 4, s. 8; 6 Anne, c. 62 (c. 35, s. 11, in Ruffhead); 8 Geo. II. c. 6, s. 12; Taylor, Evidence, § 1464, 5th ed.

(*p*) Stat. 47 & 48 Vict. c. 54, s. 9.

gage (*q*). Declarations of deceased occupiers that they held as tenants of another, being against their proprietary interest (*r*), are admissible as evidence of that other's seisin (*s*); and on this ground receipts for rent paid by a deceased person as tenant are evidence of the landlord's seisin, when produced from the proper custody (*t*). Proof of personal occupation only, though *prima facie* evidence in ejectment of a seisin in fee, is not acceptable as sufficient evidence of seisin on a sale (*u*).

Will :—proved on a sale by production of the pro- Will. bate or an office copy, whether the will relate to personal estate only or to real and personal estate, or, where the testator died on or after the 1st of January, 1898, to real estate only (*x*). If the will should not have been proved—and a will of real estate, as such, does not require to be proved (*y*)—the original must of

(*q*) Burt. Comp. pl. 418-436; Coventry, Conveyancers' Evidence, 275, 276; *Welcome v. Upton*, 6 M. & W. 536, 540, 542; *Moulton v. Edmonds*, 1 De G. F. & J. 246, 248; *Bristow v. Cormican*, 3 App. Cas. 641, 653, 668-670; *Van Dieman's Land Co. v. Table Cape Marine Board*, 1906, A. C. 92, 99. The production from the proper custody, that is, the landlord's, of a lease expired at a time beyond living memory is sufficient evidence of seisin, without proof of enjoyment thereunder; *Clarkson v. Woodhouse*, 5 T. R. 412, n.

(*r*) Above, p. 140.

(*s*) *Doe d. Daniel v. Couthred*, 7 A. & E. 235, 239; *Doe d. Welsh v. Langfield*, 16 M. & W. 497, 514; Taylor. Evidence, § 618, 5th ed.

(*t*) Burt. Comp. pl. 429.

(*u*) Hubback, Evidence, 131; 1 Dart, V. & P. 334, 5th ed.; 379, 6th ed.; 383, 7th ed.; above, p. 104.

(*x*) Coventry, Conveyancers' Evidence, 91, 93; Sug. V. & P.

414; 1 Dart, V. & P. 319, 5th ed.; 362, 6th ed.; 358, 7th ed. At common law, the probate copy of a will of personalty was conclusive evidence of the contents of the will; *Allen v. Dundas*, 3 T. R. 125; but to prove a devise of real estate, production of the original will (whether proved or not) was required. The probate of a will is now admissible as evidence of a devise of real estate under the conditions specified in stat. 20 & 21 Vict. c. 77, ss. 62, 64, 65; Taylor, Evidence, §§ 1565A, B, and C, 5th ed.; *Barracough v. Greenhough*, L. R. 2 Q. B. 612.

(*y*) Originally there was no jurisdiction to grant probate of a will dealing only with real estate; 1 Wms. Exors. pt. i. bk. iv. ch. ii. § 9, p. 389, 7th ed.; *In the Goods of Tomlinson*, 6 P. D. 209; *In the Goods of Hornbuckle*, 15 P. D. 149. But by the Land Transfer Act, 1897, stat. 60 & 61 Vict. c. 65, s. 1, probate may be granted in respect of real estate only where the testator has died on or after the 1st January, 1898.

VENDOR TO SHOW GOOD TITLE AND DISCHARGE.

course be produced (*z*). As in the case of deeds (*a*), it was not the practice on sales to require proof of the due signature and attestation of any will of real estate forming part of the title : but wills purporting to have been signed and attested as required by law (*b*) were presumed to have been made with the proper formalities (*c*). Since the Wills Act required all wills, whether of real or personal estate, to be executed in the same manner (*d*), the fact that a will has been proved strengthens the presumption that it was duly signed and attested (*e*).

(*z*) Sug. V. & P. 414.

(*a*) Above, pp. 116—119.

(*b*) See Wms. Real Prop. 245, 21st ed.

(*c*) Coventry, Conveyancers' Evidence, 91, 93-95.

(*d*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9 ; see Wms. Pers. Prop. 438, 16th ed.

(*e*) As to the evidence required on probate, see 1 Wms. Exors. pt. i. bk. iv. ch. ii. § 3 ; Wms. Pers. Prop. 449, 450, 16th ed.

CHAPTER V.

OF ADVISING ON TITLE GENERALLY.

IN the preceding chapter we endeavoured to give a general view of the vendor's obligation to show a good title and its discharge. We will now consider the same subject from the point of view of a conveyancer instructed to advise the purchaser whether the title shown by the vendor can be accepted.

The first duty of a conveyancer so instructed is of course to read the contract for sale, and then to peruse the abstract of title with reference to the contract. And his task is to ascertain whether the vendor has shown a good title according to the contract, that is, such a title as the contract binds the purchaser to accept, taking into account in the case of a contract other than an open contract the limitations or restrictions thereby imposed on the purchaser's rights as defined by law. He has to satisfy himself that on all points, save those on which the right to call for proof is precluded by the contract, the vendor has shown that he has the right to convey what he contracted to sell (*a*). If a freehold in fee were sold, the conveyancer must see that the purchaser will get both the legal and equitable estate in fee simple, free from all incumbrances, save those, if any, subject to which he contracted to take the land. If copyholds were bought, the purchaser's adviser must ascertain that his client will be duly admitted tenant on the rolls of such an estate as was sold. If the land sold were lease-

Duty of conveyancer advising the purchaser on title.

(*a*, Above, p. 94.

hold, the conveyancer must take care that the lease or term offered by the abstract corresponds at all points with that promised by the contract; the purchaser, as we have seen (*b*), being entitled to require a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale, and not being obliged to accept a lease at covenants more stringent than those usually inserted in the kind of lease purchased, unless the existence of such covenants were brought to his notice by the contract (*c*).

What should be the general scope and result of the abstract.

Vendor need not show the whole estate to be vested in himself, if he have the right to procure its conveyance.

Before discussing any of the details of an abstract examined on behalf of a purchaser, let us consider what should be its general scope and result. It should show title for the time prescribed by law or settled by special stipulation as sufficient to prove a good title, according to the nature of the property sold (*d*); it should commence with a good root of title and continue to deal with the whole legal and equitable estate in the land purchased (*e*); and it should end in showing that the vendor can convey or cause to be conveyed to the purchaser the whole estate contracted for in the land sold. But it is important to observe that it is not necessary for the vendor to show upon the abstract that the whole estate sold is vested in himself. It is sufficient if it appear that he has, or may obtain by acts of which the performance rests with himself alone (*f*), the right to convey or cause others to convey to the purchaser the estate sold; and if such a right be established, the abstract is complete, and it is considered a matter to be dealt with on the preparation of the conveyance rather than on the investigation of title for the vendor to obtain the concurrence of all other persons

(*b*) Above, p. 101, n. (*i*).

(*c*) *Reeve v. Berridge*, 20 Q. B. D. 523; *Re White and Smith's Contract*, 1896, 1 Ch. 637.

(*d*) Above, pp. 100 *sq.*

(*e*) Above, pp. 106 *sq.*

(*f*) *Brewer v. Broadwood*, 22 Ch. D. 105, 109.

necessary to vest in the purchaser the whole legal and equitable estate which he contracted to buy (*g*). Thus it is of course sufficient if the abstract show that the vendor has a power of appointment or other power which will enable him to convey the estate sold. So if the land sold be vested in trustees holding on trust for the vendor absolutely, a good title is shown on the abstract; for the vendor is entitled in equity to direct them to convey as he will (*h*). And if the land sold be subject to mortgages, the vendor has none the less shown a good title on the abstract, provided that the mortgages be immediately redeemable by him. And this is the case even though the amount secured by the mortgages exceed that of the purchase money, or the mortgages affect other lands than those purchased; as it appears to be considered that, so long as the vendor has the right of redemption, it merely rests with him to exercise it, the mortgagees being bound to take the money secured, if all that is due be tendered, and to re-convey on such payment (*i*). Here we may notice that the general rule of equity, that a mortgagor must give six months' notice of his intention to pay off the mortgage (*k*), is no bar to the immediate exercise of the right of redemption; for the mortgagor is entitled to pay to the mortgagee six months' interest in advance in lieu of such notice (*l*). Any mortgage redeemable in accordance with this general rule may therefore be considered as immediately redeemable for the purposes of a sale of the mortgaged land. But it is of course quite a different thing if the

(*g*) See 8 Ves. 436: *Townsend v. Champemoun*, 1 Y. & J. 449; Sug. V. & P. 217, 218, 349, 423-425; Dart, V. & P. 281-286, 5th ed.; 321-326, 1177 *sq.*, 6th ed.; 317-322, 7th ed.

(*i*) *Townsend v. Champemoun*, 1 Y. & J. 449; *Savory v. Underwood*, 23 L. T. O. S. 141; Sug. V. & P. 425; 1 Dart, V. & P. 283, 284, 5th ed.; 323, 324, 6th ed.; 319, 320, 7th ed.

(*k*) Wms. Real Prop. 561, 21st ed.

(*h*) Wms. Real Prop. 181, 21st ed.; *Kitchen v. Palmer*, 46 L. J. Ch. 611.

(*l*) *Johnson v. Evans*, W. N. 1889, p. 95.

land sold be subject to a mortgage, which is not to be called in or paid off during a certain term. In such case the discharge of the incumbrance is not a matter resting with the mortgagor alone; as the mortgagee cannot be obliged to receive back his money during the term (*m*).

Distinction
between
showing a
good title on
the abstract
and proving
it.

The reader must bear in mind the distinction between showing a good title on the abstract and showing a good title in the sense of completely discharging the vendor's obligation to show or make a good title. That is a matter depending on proof, not mere statement of title, and is not accomplished until an abstract showing a good title has been duly verified by production of the proper evidence (*n*). Thus, although a good title is shown on the abstract, notwithstanding the existence of mortgages exceeding the amount of the purchase-money, the vendor cannot of course make a good title if he be unable to pay off such mortgages or procure the mortgagees to release their charges.

A good title then is shown on the abstract, if it appear that the vendor has an equitable right in the land sold, by virtue of which he is, or may by doing acts which are independent of others' consent, immediately become entitled to direct the conveyance to the

(*m*) See *Esdaile v. Stephenson*, 6 Madd. 366; *Lewin v. Guest*, 1 Russ. 325; Sug. V. & P. 425; 1 Dart, V. & P. 284, 5th ed.; 324, 6th ed.; 320, 7th ed.

(*n*) See *Southby v. Hutt*, 1 My. & Cr. 207, 212, 213; above, pp. 115 sq. In actions for specific performance of contracts for sale of land the usual inquiry directed as to title is whether a good title can be made to the property sold, and if so, when it was first shown that such good title could be made; Seton on Judgments,

2226, 6th ed. The inquiry when a good title was first shown relates to the time when it was first shown upon the face of the abstract; but the inquiry, whether a good title can be made, means whether the vendor can prove a good title by the usual evidence; *Parr v. Lovegrove*, 4 Drew. 170; 4 Jur. N. S. 600; Sug. V. & P. 424, 425; see however *Halkett v. Dudley*, 1907, 1 Ch. 590, 606, where *Parr v. Lovegrove* was not cited, and Parker, J., appears to have overlooked this distinction.

purchaser of all the estate sold (*o*). And where a future day is fixed for completion of the contract, a good title is sufficiently shown on the abstract if it appear that the vendor will certainly have such an equitable right as above mentioned before the time fixed for completion, although he have not and cannot immediately procure such right (*p*). But it is otherwise if any part of the estate contracted for be outstanding in some person, whom the vendor has no right to direct to convey, and the vendor cannot procure such right without the other's consent. In such case a good title in the vendor is not shown. This may be illustrated, not only by the example already given of land subject to a mortgage not to be paid off during a certain term, but also by the instances of lands subject to dower, or a jointure rent-charge (*q*) or restrictive covenants (*r*), or of lands, under which the mines and minerals are not the vendor's (*s*), or of land sold as held for a term of a certain number of years, which is in fact determinable earlier at the lessor's option (*t*). *A fortiori*, the purchaser can object to the title, where it appears that the whole title is in some third person whose conveyance the vendor has no right, legal or equitable, to direct. Nor is the case altered by the fact that the vendor offers to procure the concurrence of such third person, and the latter is willing to give it; so long as the latter is under no obligation enforceable in a court of justice to convey

Good title not shown if any estate outstanding in one, whom the vendor has no right to direct to convey.

(*o*) See note (*g*) to p. 165, above.

(*p*) Dart, V. & P. 284, 5th ed.; 324, 6th ed.; 320, 7th ed.; see *Noble v. Edwards*, 5 Ch. D. 378; *Bellamy v. Debenham*, 1891, 1 Ch. 412.

(*q*) *Estate v. Stephenson*, 6 Madd. 366.

(*r*) *Phillips v. Cuddeleugh*, L. R. 4 Q. B. 159; *Pensel v. Tucker*, 1907, 2 Ch. 191, where the pro-

perty sold was subject to a restrictive stipulation as to light, and a drain, which was a sewer vested in the local authority, ran under the land.

(*s*) *Bellamy v. Debenham*, 1891, 1 Ch. 412; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, 424, 425.

(*t*) *Weston v. Savage*, 10 Ch. D. 736.

*Re Bryant and
Barningham's
Contract.*

according to the vendor's direction (*u*). On this point a recent case (*x*) is very instructive. Two persons sold land as trustees for sale. It appeared from the abstract that the trust for sale did not arise until after the death of a tenant for life, who was still living: but the vendors, on this objection being pointed out, offered to procure a conveyance from the tenant for life under the Settled Land Acts. This the purchaser declined; and the vendors endeavouring to oblige him to take this title in a vendor and purchaser summons, it was held that he was justified in his objection thereto. The court pointed out that the vendors themselves could make no title, having no immediate right to convey, and that the proposed conveyance could only be effectually secured by a new contract made with the tenant for life; an arrangement, into which the vendors had no right to require the purchaser to enter.

Purchaser
must at once
repudiate the
contract if he
wish to insist
on the objec-
tion.

It appears however that if the purchaser propose to object to the title shown on the ground that the whole or some part of the estate contracted for in the land sold is outstanding in some person, whom the vendor has no right to direct to convey, he must insist on such objection at once, and must immediately repudiate the contract (*y*). If he require the vendor to remove the objection by obtaining the concurrence of the other person or persons entitled, or if he entertain (except without

(*u*) *Lewin v. Guest*, 1 Russ. 325; *Forrer v. Nash*, 35 Beav. 167, 171; *Brewer v. Broadwood*, 22 Ch. D. 105; *Lee v. Soames*, 36 W. R. 884; cf. *Re Baker and Selmon's Contract*, 1907, 1 Ch. 238, where a trustee sold as the authorised agent of the beneficiaries.

(*x*) *Re Bryant and Barningham's Contract*, 44 Ch. D. 218; see also *Re Head's Trustees and Macdonald*, 45 Ch. D. 310.

(*y*) *Halkett v. Dudley*, 1907,

1 Ch. 590, 597. The purchaser is entitled, in such circumstances, to repudiate the contract at once, and need not wait till the day fixed for completion; *Hoggart v. Scott*, 1 Russ. & My. 293, 295; *Forrer v. Nash*, 35 Beav. 167, 171; *Weston v. Savage*, 10 Ch. D. 736; *Brewer v. Broadwood*, 22 Ch. D. 105, 109; *Lee v. Soames*, 36 W. R. 884; *Halkett v. Dudley*, 1907, 1 Ch. 590, 596; and see below, p. 185, n. (*l*).

prejudice to his right to repudiate the contract) (z) any proposal made by the vendor so to remove the objection, he may lose his right to insist on the objection and may find himself obliged to perform the contract. For if the purchaser show himself willing to go on with the contract, the vendor may get in the outstanding interests, though they should amount to the whole title, and he will then be in a position to enforce the specific performance of the contract. And if in such case the vendor bring an action for that purpose, it will be no defence to allege that he could make no title by the time fixed for completion. For if the purchaser has continued to recognise the contract as binding, it will be sufficient to enable the vendor to enforce specific performance, if he can make a good title at the hearing (a) or even when the result of the usual inquiry as to title is certified (b). Besides this, if the contract contain the usual stipulation enabling the vendor to rescind in case of insistence on an unwelcome requisition, and the purchaser negotiate with the view of obtaining the removal of an objection, which would have justified him in repudiating the contract at once, the purchaser runs the risk of the vendor's exercising his power to rescind and so escaping the liability of paying the purchaser's expenses as damages (c).

We have already considered what documents of title the abstract should contain and the manner in which they ought to be abstracted (d). Any defects in these

Requisitions as to the contents and manner of making the abstract.

(z) See *Morley v. Cook*, 2 Hare, 106, 115; 7 Jur. 79, 80; *Southcomb v. Bp. of Exeter*, 6 Hare, 213, 216, 219, 220.

(a) *Hoggart v. Scott*, 1 Russ. & M. 293; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54.

(b) *Egston v. Simonds*, 1 Y. & C. C. C. 608; Fry. Sp. Perf. §§ 1366-9, pp. 607, 608, 3rd ed.;

580, 581, 4th ed.; 2 Dart. V. & P. 1058-1060, 5th ed.; 1178-1180, 6th ed.; 1065-1068, 7th ed.; and see *Murrell v. Goodyear*, 1 De G. F. & J. 432; *Halkett v. Dudley*, 1907, 1 Ch. 590, 597-600.

(c) See *Re Deighton and Harris*, 1898, 1 Ch. 458; below, p. 184.

(d) Above, pp. 106-113.

respects should of course be the subject of requisition. The purchaser's adviser must insist on being furnished with an abstract showing a complete chain of the conveyances or other documents dealing with the legal estate in the property purchased from the time of commencement of title down to that of the contract for sale. And whenever the abstract gives him notice of any equitable estate or interest in the premises, he must require the title to such estate or interest to be abstracted (*e*), and must see that the same has been ultimately got in or released or will be conveyed to the purchaser: unless, of course, the circumstances are such that the concurrence of the beneficiaries is unnecessary, as upon an ordinary trust for sale. It is his further duty to ascertain that each of the abstracted conveyances is at all points complete, so that it really has in law the effect which it purports to have. Thus he must consider whether the conveying parties have due capacity to convey the estate assured; if so, whether they have used an instrument proper and words apt to carry out their intention; and then whether the instrument is duly executed or perfected as required by law. And if he observe any deficiency, he should call for its rectification. If a document be abstracted in an improper manner (as constantly happens) conveyancing counsel ought to require the vendor to furnish a proper abstract sufficient to enable him to exercise his own judgment as to the effect of the words actually used. He ought not to rest satisfied with a mere statement of the effect of any material clause or document; for the very purpose of laying the abstract before him is that he should give his opinion on the effect of the deeds. And if he accept statements of the effect of clauses where he ought to be informed of the exact words used and judge of their effect himself, he is really laying a duty, which he ought

(*e*) See above, pp. 110–112.

to perform in person, on the gentleman who examines the abstract with the deeds. Owing to the unskilled and slovenly way in which abstracts are now too often prepared, counsel have to bear this constantly in mind. What clauses ought to be abstracted in full and what may be properly passed over with a mere statement has been considered above (*f*). We will merely give one constantly recurring example of the duty we have been pointing out. A proviso for reconveyance in a mortgage deed is now often abstracted in these words—proviso for redemption. And such abstracting is constantly allowed to pass either without comment or with the remark that it is presumed that this proviso is in the usual form. That however is exactly the point on which counsel's opinion is desired. A proviso for reconveyance is the only clause in a mortgage deed which effectively shows what charge on the property is thereby created, and on what terms that charge is redeemable, and it is also a limitation of the equitable estate in the property subject to the charge. All these matters are material to the title, even though a subsequent reconveyance from mortgagee to mortgagor appear on the abstract (*g*). The proviso therefore

(*f*) Pp. 112-114.

(*g*) Of course mortgages are usually redeemable on payment of principal and interest by the original mortgagor to the original mortgagee, when reconveyance is to be made to the mortgagor according to his former estate. But, since persons not named as parties to indentures have been allowed to take benefits thereunder (see *Wms. Real Prop.* 156, 21st ed.), there is nothing to prevent a proviso in a deed of mortgage between A. borrower and B. lender that on payment of principal and interest by A. to C., B. shall reconvey to D. in fee. In such case, if there were a subsequent reconveyance by B.

to A. in fee on payment by A. to B., a purchaser acquiring title under these deeds would take with notice of the equities both of C. and D. This example is of course an extreme case; and the rule no doubt is that a mortgagor's equitable estate in the mortgaged lands shall not be altered by the terms of a proviso for redemption without a clear expression of an intention in that behalf (*Innes v. Jackson*, 16 Ves. 356; *Co. Litt.* 208 a, n. (1); *Stansfield v. Hallam*, 5 Jur. N. S. 1334; *Hastings v. Astley*, 30 Beav. 260; *Re Betton's Trust Estates*, L. R. 12 Eq. 553; *Re Byron's Settlement*, 1891, 3 Ch. 474); but such an intention may be clearly

should always be so abstracted as to enable the purchaser's counsel to judge for himself, from the exact words used, of its effect in these respects (*h*). And unless counsel insist on being furnished with such an abstract, he does not discharge his duty to his client.

Estate of
grantee to
uses.

Here the reader may be warned of a pitfall, which the writer has several times encountered in practice; namely, the omission, since the Conveyancing Act of 1881 took effect (*i*), to limit an estate in fee simple to a grantee to uses in deeds intended to take effect under the Statute of Uses. The consequence of this omission is that such grantee takes an estate for life only (*k*), and the uses declared are executed by the statute or turned into legal estates (*l*) only during the life of the grantee to uses and no longer (*m*). Uses declared of the inheritance in such circumstances are of course, generally speaking, valid in equity and enforceable as trusts: but the legal fee remains in the grantor; and

expressed in the proviso (see 16 Ves. 370, 371), and any variation in the limitation thereby made from the mortgagor's former estate raises a *question*, whether any alteration was intended; Davidson, Prec. Conv. vol. ii. pt. ii. pp. 38-43, 4th ed. An unusual proviso for redemption occurred in *Williams v. Morgan*, 1906, 1 Ch. 804.

(*h*) See 1 Prest. Abst. 149, 2nd ed., where note that the author appears to be speaking of a proviso for redemption in the old form making void the conveyance to the mortgagee on repayment (see Davidson, Prec. Conv. vol. ii. pt. ii. p. 31, 4th ed.; 5 Bythewood & Jarm. Prec. Conv. 3rd ed. by Sweet, 544, 555), and that, according to the principles there laid down, it should always be shown, in abstracting a proviso for *reconveyance*, to whom

the reconveyance is limited to be made.

(*i*) Such an omission was not previously common, as it was the regular practice to limit estates to all grantees *and their heirs*. The mistake has generally arisen where use has been made of the statutory limitation to a grantee *in fee simple*; and the draftsman has forgotten that it is equally necessary to limit the lands to the grantee to uses in fee simple as to assure by apt words an estate of inheritance to *cestui que use* intended to take the benefit of the conveyance.

(*k*) Wms. Real Prop. 112, 21st ed.

(*l*) Ibid. 173-176, 21st ed.

(*m*) Dyer, 186 a; *Jenkins v. Young*, Cro. Car. 230; *Meredith v. Joans*, ibid. 244; Sug. Pow. 149, 8th ed.; Williams on Settlements, 7; *Re Hunter and Hewlett's Contract*, 1907, 1 Ch. 46.

on a subsequent sale of the land by persons entitled under the uses, the purchaser must require the legal estate of inheritance to be conveyed to him by the original grantor, his heirs, executors, administrators or assigns.

It is the duty of a conveyancer perusing an abstract on the purchaser's behalf to see that the vendor discharges his obligation of proving the identity of the property sold with that described in the various documents abstracted (*n*). The conveyancer must therefore carefully compare the abstracted parcels as he proceeds, and ascertain that the descriptions in the title deeds agree with each other and with the description in the contract. Where the abstracted descriptions wholly or partially fail to show the identity of the property comprised in the title deeds with that sold, further evidence of identity should be required, notwithstanding that the purchaser may have bought subject to the usual condition as to such evidence (*o*). The identity of the property sold with that comprised in the title deeds is the most important link in the whole chain of proof of the vendor's title; without evidence of such identity, the most perfect title shown by the deeds proves nothing. Purchasers cannot therefore be advised to dispense with such evidence (where they are entitled to require it), on the ground that they must bear the expense of it, if not in the vendor's possession (*p*). Identity.

It is the duty of the purchaser's counsel or solicitor, besides seeing that the documents which ought to be abstracted are abstracted and are properly abstracted, to note all facts material to the title stated on or appearing from the abstract, and to require them to be proved Calling for evidence of facts.

(*n*) Above, pp. 33, 65: Sug. V. & P. 413.

(*o*) See above, pp. 65, 72.

(*p*) See above, pp. 45, 136.

by the usual conveyancing evidence. What this is has been already sufficiently considered (*q*). But we may remark that, owing to the rule which now throws upon the purchaser the expense of procuring all evidence of title not in the vendor's possession (*r*), it is a convenient plan to frame requisitions calling for evidence of facts in the following form:—"Has the vendor any evidence of any kind in his possession of (*the death, marriage, or other fact required to be proved*)? If so, he is required to produce such evidence. If not, purchaser reserves his right to call for the usual formal evidence of such (*fact*) at his own expense." As we have already pointed out (*s*), it is often material to a title to prove that some event has *not* happened. This should not be forgotten upon the perusal of the abstract; and the conveyancer should, in these cases, call for such evidence as he can require.

Death duties. Another matter to be attended to on the perusal of the abstract is the incidence of the death duties. Whenever the death is stated of a person interested in the lands sold, it must be considered whether this death gave rise to a claim for legacy, succession, estate or settlement estate duty in such a manner that the duty will, if unpaid, remain a charge on the land; and if so, the receipts for duty payable must be required to be produced or the claim discharged. The subject of the death duties is more fully considered below (*t*).

Stamps. It is not the practice for vendors to mark on the abstract what stamps are impressed on the various title deeds: but the purchaser's solicitor must ascertain this on the examination of the abstract with the deeds (*u*), and he should note in the margin of the abstract what

(*q*) Above, pp. 131 *sq.*

(*r*) Above, pp. 45, 136.

(*s*) Above, p. 132.

(*t*) See the chapter on the Death Duties in the second volume.

(*u*) Above, p. 143.

stamps each abstracted document bears, or their absence, where a document required by law to be stamped is unstamped. If the abstract come to counsel after it has been compared with the deeds, he must of course consider whether all the abstracted documents appear to be rightly stamped. If he receive the abstract before the examination of the deeds, he should remind his client, in advising on the title, that it must be ascertained whether the abstracted documents are duly stamped. If any document, which ought to be stamped, be unstamped or insufficiently stamped, the vendor should be required to procure it to be properly stamped; which, as we have seen, he is bound to do at his own expense (x).

Besides the requisitions, properly so called, demanding the production of some particular piece of evidence to complete the title, it is generally desirable for the purchaser's advisers to make certain inquiries of the vendor respecting the property sold (y). Thus if an estate be sold under the usual condition that it is sold subject to all subsisting chief rents, easements, tenancies and tenants' claims, whether mentioned in the particulars of sale or not (z), inquiry should be made of the vendor whether there are any such rents, easements, tenancies or claims. This is a very pertinent question; for if it be omitted, the purchaser will have notice of any rights which he might have discovered by the inquiry (a); and, as we have seen, it is held that this general condition does not enable the vendor to enforce the contract specifically, if the property be subject to any rents, easements, tenancies or claims, which are serious incumbrances and were known to the vendor but omitted from the par-

Inquiries
respecting the
property sold.

(x) Above, p. 130.

(y) See Appendix (C), below, for a form of the inquiries which may usefully be made as supple-

mental to the requisitions on title.

(z) Above, p. 73.

(a) *Re Alms Corn Charity*, 1901, 2 Ch. 750.

particulars(*b*). And in every case it should be asked whether the property sold is subject to any easement or other right(*c*), or to any rentcharge, or to any quit-rent or other incident of tenure(*d*), and what outgoings there are in respect of the property sold. Land tax and tithe rentcharge, being general liabilities to which all lands are regularly subject, need not be expressly mentioned on a contract to sell land; it is understood that the purchaser will take subject to these liabilities, which are not regarded as incumbrances(*e*). And it is of course unnecessary to mention that the purchaser will have to pay the usual local rates, or property tax. If there be no other outgoings than these, the purchaser has no cause for objection: but the existence of rents or rentcharges (other than tithe rentcharge) not disclosed by the contract is a different matter. Quit rents, being incidents of tenure, are regarded in equity as a proper subject for compensation, not as a ground for resisting specific performance; and so are rentcharges of trifling amount(*f*). But the existence of a rentcharge of substantial amount is an objection to the title(*g*); as is the existence of a considerable ground rent not mentioned in the particulars on the sale of houses held for a long term of years(*h*). Another inquiry useful to be made is whether the property sold is subject to

(*b*) *Heywood v. Mallieu*, 25 Ch. D. 357; *Nottingham Patent Brick and Tile Co. v. Butler*, 16 Q. B. D. 778; above, p. 73, n. (*t*).

(*c*) See *Pemsel v. Tucker*, 1907, 2 Ch. 191; above, p. 167, n. (*v*).

(*d*) Onerous incidents, such as heriots, are sometimes attached to the tenure of freeholds; see *Copestake v. Hoper*, 1907, 1 Ch. 366, reversed, 1908, 2 Ch. 10; *Wms. Real Prop.* 58, and n. (*u*), 478, n. (*i*), 21st ed.

(*e*) *Sug. V. & P.* 322; 1 *Dart, V. & P.* 352, 5th ed.; 398, 399, 6th ed.; 393, 394, 7th ed. If land be sold free of land tax or

tithe rentcharge, the case is of course different; as the vendor must then prove that the land is, as alleged, free from such liability; see *ibid*.

(*f*) *Esdaile v. Stephenson*, 1 S. & S. 122; *Sug. V. & P.* 312; 2 *Dart, V. & P.* 1078, 5th ed.; 1205, 6th ed.; 1093, 7th ed.; see above, p. 43.

(*g*) *Portman v. Mill*, 1 *Russ. & My.* 696; *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788; *Sug. V. & P.* 313; above, p. 167.

(*h*) *Jones v. Rimmer*, 14 Ch. D. 588.

any drainage or land improvement or other statutory charge. Drainage and land improvement charges of course principally affect agricultural land: but it must be remembered that land once occupied for cultivation is often built over, and that such charges may subsist after the agricultural aspect of the property has quite disappeared. And rentcharges may now be created under the Improvement of Land Act, 1864, and its amending Acts (*i*) for a very wide range of improvements, not exclusively affecting agricultural land. Agricultural land may also be liable to charges created under the Agricultural Holdings Act, 1883 or 1908 (*k*). In the case of town property or building land, charges may arise under Local Management or Improvement Acts, the Public Health Act, 1875 (*l*), or the Private Street Works Act, 1892 (*m*), for the expenses of paving, sewerage, or lighting the adjoining streets or for other works ordered to be done by the proper authority (*n*). House property in London may be affected by a party wall notice under the London Building Act, 1894 (*o*); or the owner thereof may incur liability owing to a "dangerous structure" notice and an order consequent thereon under the same Act and the London Building Act, 1898 (*p*), or through being required to abate a nuisance under the Public Health (London) Act, 1891 (*q*). And similar liability may be incurred elsewhere under the Public Health Act, 1875 (*r*). In all

(i) See Chap. XII. § 2, below.

(k) Stat. 46 & 47 Vict. c. 61, ss. 29-32, repealed and replaced by 8 Edw. VII. c. 28, ss. 15-19, 49.

(l) Stat. 38 & 39 Vict. c. 55, see ss. 150, 257.

(m) Stat. 55 & 56 Vict. c. 57.

(n) *Mudgley v. Coppock*, 4 Ex. D. 309; *Re Bettesworth and Richer*, 37 Ch. D. 535; *Stuck v. Meaden*, 1900, 1 Ch. 683; *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226; *Camberwell Corp'n. v. Dixon*,

1910, 1 K. B. 424.

(o) *Carlisle v. Salt*, 1906, 1 Ch. 335, as to which see the writer's criticism in 50 Sol. J. 611.

(p) *Re Hughton and Reed's Contract*, 1902, 2 Ch. 214; C. A., 1903, 1 Ch. 287; explained in *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 231.

(q) *Barshit v. Tagg*, 1900, 1 Ch. 231.

(r) Stat. 38 & 39 Vict. c. 55, ss. 94-104, 160, incorporating 10 & 11 Vict. c. 34, ss. 75-78.

these cases, therefore, inquiry should be made whether any demand has been made, notice given, resolution passed, or order made, which may subject the property sold or its owner to any such charge or liability (*s*). Such charges or liabilities, if attaching on the property sold or becoming payable before the time for completion, come under the head of outgoings which the vendor ought to discharge (*t*). And with regard to charges, generally, the rule of course applies that the purchaser is entitled to have the property sold free from all incumbrances, except those, if any, subject to which he agreed to buy (*u*). It is also useful to ask, on buying a house not detached, if the walls are party walls, and as to any suburban property, if any adjoining street or road has been taken over by the local authority.

Vendor bound to answer all relevant questions.

Re Ford and Hill.

The general rule applicable to inquiries of the above nature is that the vendor is bound to answer all relevant questions with respect to the property sold (*x*): but the limits of inquiry are shown in the case of *Re Ford and Hill* (*y*) already mentioned. It was there held that a vendor need not answer the inquiry, Is there, to the knowledge of the vendor or his solicitor, any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract? This question the Court of Appeal held to be not so much a requisition as a searching interrogatory. As we have already pointed out (*z*), there is a clear distinction between putting questions to ascertain that the title shown on the abstract is fully proved and at all points complete, and interrogating the vendor whether he knows of any matter of title besides those stated on the abstract.

(*s*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625; below, Ch. XII. Sect. 2.

(*t*) See cases cited in notes (*l*), p. 50, (*n*), p. 177, above; below,

Ch. XI. Sect. 1.

(*u*) Above, pp. 41, 94.

(*x*) Above, p. 135.

(*y*) 10 Ch. D. 365.

(*z*) Above, p. 135, n. (*f*).

Having regard to the practice already stated (*a*) of not disclosing purely equitable charges or interests on the abstract, where the purchaser may acquire a good title without notice of them, it seems obvious that such an interrogatory is objectionable. But it is thought that the decision in *Re Ford and Hill* does not go further than this, and does not exonerate the vendor from the obligation of answering questions relevant to the issue between the parties, which is, has the vendor *proved* the title, which he has *shown on the abstract*? (*b*).

When the abstract is laid before counsel to advise thereon, he settles the necessary requisitions, and writes his opinion on the title according to the circumstances of the case; as that, if the requisitions be satisfactorily answered, a good title according to the contract will have been shown, or that some irremovable objection to the title appears. At the same time he usually advises what searches ought to be made. The subject of searches is reserved for subsequent consideration (*c*).

Counsel
advising
on title.

Searches.

As we have seen (*d*), it is usually stipulated that the purchaser's requisitions on or objections to the title shall be sent in within a specified time after the delivery of the abstract, that in this respect time shall be of the essence of the contract, and that in default of any requisitions or objections so made, the purchaser shall be taken to have accepted the title. The time so limited only begins to run from the delivery of a perfect abstract (*e*). But if the abstract delivered be in accordance with the contract, the purchaser must be careful to send in his requisitions or objections within the time appointed, or he will lose his right to insist

Time for
making
requisitions.

(*a*) Above, p. 110.

(*d*) Above, p. 62.

" See above, p. 166.

(*c*) See below, Ch. XII. Sect. 2.

(*e*) Above, p. 63.

*Want v.
Stallibrass.*

upon them (*f*). If, however, the abstract delivered show no title at all on the face of it, the purchaser may take this objection at any time, notwithstanding any such stipulation as the above, and although the day fixed for sending in requisitions be past. Thus in *Want v. Stallibrass* (*g*), two persons entered into a contract to sell land, stipulating that all objections and requisitions not sent in within fourteen days after the delivery of the abstract should be considered as waived. They then delivered an abstract from which it appeared that they were trustees of the property sold for a third person for life and after his death for sale; and they offered the concurrence of the tenant for life, apparently supposing that this would enable them to make a good title. The purchaser, after the fourteen days had expired, took the objection that, as the trust for sale did not arise until the death of the tenant for life, it was not presently exercisable, even with the tenant-for-life's concurrence (*h*). And it was held by the Court of Exchequer that the purchaser was entitled to recover his deposit, as the above-mentioned stipulation did not exonerate the vendors from their obligation of showing a good title, and it was apparent on the face of the abstract delivered by them that they had failed to perform this obligation. So in *Re Tanqueray-Willaine and Landau* (*i*), two persons sold land under the usual condition limiting the time for sending in requisitions or objections, and offered to make title as executors and trustees of a will selling under the power of sale implied by the testator's debts being charged on his real estate (*k*). After the time so limited had expired the purchaser took the objection that the words of the

*Re Tanqueray-
Willaine and
Landau.*

(*f*) See *Oakden v. Pike*, 34 L. J. (N. S.) Ch. 620; *Rosenberg v. Cook*, 8 Q. B. D. 102; *Pryce-Jones v. Williams*, 1902, 2 Ch. 517.
(*g*) L. R. 8 Ex. 175.

(*h*) Above, p. 168.

(*i*) 20 Ch. D. 465.

(*k*) Wms. Real Prop. 260, 21st ed.

will did not create such a charge of debts. And it was held both by Kay, J., and the Court of Appeal that it was not too late to raise this objection, because (as they said) it "went to the root of the title." In other words, it was an objection that the vendors had failed on the face of their own abstract to show any title at all. It also appears that objection to anything, which is a matter of conveyance rather than of title (*l*), may well be made after the time limited for sending in requisitions on title has expired. Thus where the abstract shows a title in the vendor, subject to mortgages, the purchaser can of course require the mortgagees to concur in the conveyance, although he may not have sent in any requisition to that effect within the appointed time. For, as we have seen (*m*), a vendor is considered to have shown an acceptable title, if it appear from the abstract that on doing certain acts, which he can perform immediately and independently of others' consent, he will have the right to direct the conveyance of the whole estate contracted for. But by his own showing he has no good title except he do such acts. It is therefore a matter of course that he shall perform them; and it is unnecessary for the purchaser to address any requisition to this point (*n*). But it is of course the better plan to take any objection to the title in the manner and within the time prescribed by the contract, even though the objection be an absolute failure to show title on the face of the abstract (*o*). And it is also desirable to include in the requisitions to be sent in within the time limited a demand for the concurrence in the conveyance of any mortgagees or other incumbrancers whose charges are redeemable (*p*).

l) See above, p. 164: *Denny v. Hancock*, L. R. 6 Ch. 1, 8, 9, 13; 1 Dart, V. & P. 429, 5th ed.; 494, 6th ed.; 508, 7th ed.

(*m*) Above, pp. 164—166.

(*n*) *Re Glougl and Miller's Con-*

tract, 23 Ch. D. 320, 327.

(*o*) See above, p. 168, as to the danger of waiting before taking objection to the title.

(*p*) 1 Dart, V. & P. 429, 5th ed.; 494, 6th ed.; 508, 7th ed.

If the abstract show a good holding title, the purchaser cannot insist, after the time limited for sending in requisitions is gone by, on any objection thereto, which he might otherwise have taken (*q*).

What requisitions should be made and insisted on.

The conveyancer should, as a rule, be guided, in making requisitions on title, by the countenance he would expect his contention to receive from the Court in proceedings either to enforce specific performance or to recover the deposit (*r*). He should therefore make no frivolous or unnecessary requisitions (*s*), and he should be chary of asking for anything which he considers the other party not bound to concede. There are, of course, occasions when such requests may be properly made, and will be answered out of courtesy; and on making requisitions in the first instance it is legitimate to ask for what it is desirable that the purchaser should have (unless the requisition be plainly prohibited by the contract), although the vendor be not in strictness bound to comply. But if any requisition be met with a refusal, then the purchaser should not insist upon it, if he does not expect that his contention will be upheld by the Court.

Where the vendor may rescind.

If the contract contain the common stipulation allowing the vendor to rescind the contract in case the purchaser insists on any requisition which the former is unwilling to remove or comply with (*t*), extra care must be exercised in selecting the requisitions which are to be pressed; and a conveyancer acting on behalf of a willing purchaser should only maintain his objections on points essential to the title. This is especially the

See above, p. 168, as to requiring the concurrence of any person, whose interest is not redeemable without his consent.

(*q*) *Pryce-Jones v. Williams*, 1902, 2 Ch. 517. As to the limits

of the rule in *Want v. Stallibrass*, see L. Q. R. xix. 161.

(*r*) Above, p. 36.

(*s*) 1 Dart, V. & P. 428, 5th ed.; 493, 6th ed.; 506, 7th ed.

(*t*) Above, p. 64.

case, where the stipulation is in the old common form giving the vendor the right to rescind, when the purchaser has insisted on an unwelcome requisition, without allowing to the latter any opportunity of withdrawing the requisition (*u*). For, as we have seen (*x*), the Courts are now inclined to allow a vendor to exercise a right of rescission according to the letter of the stipulation reserving it, provided only that he do so reasonably and in good faith and not arbitrarily or capriciously; and so long as the vendor has a good reason for rescinding (*y*), he is not obliged to inform the purchaser, in the notice to rescind, what that reason is (*z*). And if the condition do not give the purchaser the option of withdrawing the objection, on which he has insisted, the vendor may rescind without offering the purchaser any opportunity of retracting, and the latter cannot recover his rights under the contract by abandoning the objection after he has received the notice to rescind (*a*). Where the condition gives the right of rescission on an unwelcome requisition being made (not insisted on), the purchaser is in an even worse plight, as this gives the vendor the opportunity of rescinding on the first delivery of such a requisition (*b*); which he would not have if the condition of rescinding were that the purchaser should insist on the requisition (*c*). As we have seen (*d*), such conditions are now frequently drawn so as to allow the purchaser to withdraw the requisition within a limited time after he has received notice of intention to rescind; and when this

(*u*) 1 Davidson, Prec. Conv. 564, 614, 4th ed.; 169, 522, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 233, 234, 2nd ed.

(*x*) See above, p. 64, and cases cited in note (*s*) thereto.

(*y*) See *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, 420.

(*z*) *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375.

(*a*) *Duddell v. Simpson*, L. R. 2 Ch. 102, 107, 108; *Re Dames & Wood*, 29 Ch. D. 626.

(*b*) *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375.

(*c*) *Greaves v. Wilson*, 25 Beav. 290, 295, and cases cited in the two previous notes.

(*d*) Above, pp. 64, 72.

is the case, there is no reason why requisitions, which are thought needful, should not be pressed, so long as notice to rescind is not given. Where the stipulation is that the vendor may rescind, if the purchaser shall insist on any requisition, which the vendor is, on the ground of expense or any other reasonable ground, unwilling to comply with, the vendor is not entitled to rescind unless there is some such ground for his refusal to comply with the requisition (*e*). In any case, a notice to rescind expressed to be given "without prejudice" is null and void (*f*).

Where the vendor has no title.

It has been held that a vendor, who has no title at all, cannot take advantage of a stipulation in the usual form enabling him to rescind, so as to escape the liability of paying the purchaser's expenses as damages (*g*). But this doctrine was not applied where a vendor having a beneficial interest, but not the entire legal title, sold in good faith, and a troublesome requisition to get in the outstanding legal estate was insisted on; notwithstanding that the defect of title appears to have been such as would have justified the purchaser in repudiating the contract at once on the ground that the vendor had failed to show a good title on the face of his own abstract (*h*). And where a purchaser claimed to repudiate the contract unless the vendor removed an objection, which the Court afterwards held to be un-

(*e*) *Re Weston and Thomas's Contract*, 1897, 1 Ch. 244; see above, p. 90.

(*f*) *S. C.*

(*g*) *Bowman v. Hyland*, 8 Ch. D. 588, commented upon in *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458, and *Re Jackson and Haden's Contract*, 1905, 1 Ch. 603, 607; 1906, 1 Ch. 412, 419, 423, 425; see above, p. 169.

(*h*) *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458. The vendor had sold a lease, and the

abstract only showed title to an equitable interest in an underlease (see above, pp. 101, n. (*i*), 164). It should be noted that the purchaser did not at once repudiate the contract on this ground; he negotiated, requiring the objection to be removed and so treated the contract as still subsisting; see above, pp. 168, 169. The Court moreover treated the objection as relating to a matter of conveyance, not of title. See also *Hippenstall v. Rose*, 33 W. R. 30.

tenable, it* was considered that the vendor was entitled to rescind the contract on the objection being pressed (*i*). But if the vendor fail to show a good title on the face of his own abstract and the purchaser at once repudiate the contract on this ground, it is thought that the vendor cannot then take advantage of a clause in the contract reserving the right to rescind, and so save his liability to pay the purchaser's expenses as damages. For when the vendor has so failed to perform his contract, and the purchaser has at once elected to treat the contract as broken, how can the former any longer claim to exercise a right given by the contract itself? It is held that, where a vendor of land fails to show a good title thereto, he commits such a breach of contract as discharges the purchaser from the duty of performing his part of the agreement and precludes the vendor himself from enforcing any stipulation in his own favour therein contained. The purchaser, on such a breach, is entitled to rescind the whole contract, and every part of it is annulled as against him (*k*). The proper time, moreover, for the vendor to perform his obligation of showing a good title is upon the delivery of the abstract; and it is submitted that when the vendor has definitely assumed to perform this obligation by sending in the abstract, then if a good title be not shown on the face of it, the purchaser is entitled both at law and in equity at once to rescind the contract, and need not wait for the day fixed for completion (*l*). Besides, it may be doubted whether

(*i*) *Isaacs v. Towell*, 1898, 2 Ch. 285.

(*k*) *Duke of St. Albans v. Shore*, 1 H. Bl. 270, 278; *Seaward v. Willock*, 5 East, 198, 202; *Souter v. Drake*, 5 B. & Ad. 992; and

see above, pp. 32, n. (*b*), 180, 181; L. Q. R. xix. 168-171; *Hollivell v. Seacombe*, 1906, 1 Ch. 426, 434; below, Chap. XVIII. § 2; XIX. § 1.

(*l*) *Weston v. Savage*, 10 Ch. D. 736, which was an action by a purchaser as plaintiff to enforce actively his right of rescission and to recover his deposit, and was expressly decided from a common law point of view (see 10 Ch. D. 741); *Brewer v. Broadwood*, 22 Ch. D. 105, 109, where the purchaser's right of rescission was allowed as a

a case like this, in which the purchaser does not insist that the vendor shall remove any objection or comply

good defence to the vendor's action for damages for breach of the contract, and it was laid down that the purchaser's right of immediate repudiation is not confined to cases where the time fixed for completion is of the essence of the contract; *Lee v. Soames*, 36 W. R. 884, where the purchaser sought, as plaintiff, to enforce his right to rescind and recover his deposit and expenses. The vendor's obligation to show a good title at the time of the delivery of the abstract is also illustrated by the case of *Want v. Stallibrass*, L. R. 8 Ex. 175, above, p. 180, where the vendor's utter failure to show any title at all upon the face of the abstract was held to be such a breach of contract as discharged the purchaser from the whole agreement, including a stipulation that he must send in his requisitions or objections within a specified time; see L. Q. R. xix. 172. It is respectfully submitted that the theory put forward by Parker, J., in *Halkett v. Dudley*, 1907, 1 Ch. 590, 596 (in which none of the above cases was cited), is erroneous. The learned judge there maintained that the purchaser's right to repudiate the contract at once upon the vendor's failure to show a good title, without waiting for the day fixed for completion, is merely an equitable right affecting the equitable remedy by way of specific performance and is solely attributable to the doctrine of want of mutuality. If that were so, the purchaser could not plead his right so to rescind the contract as a defence to the vendor's action for damages for breach of the contract; for the doctrine of want of mutuality has no place in English law, except as a defence to an action for specific performance; see below, Chap. XIX. § 3. Besides, to take active proceedings as plaintiff in such a case, a purchaser must have a *legal* right of rescission, though the proceedings in which he can so assert this right owe their origin to the Court of Chancery's concurrent equitable jurisdiction; see below, Chap. XIX. § 1. Parker, J., also said (1907, 1 Ch. 596) that he did not see why, in principle, a vendor, who has sold land, which does not belong to him, but to which he acquires a title before the day fixed for completion, should not be able to recover damages from the purchaser then refusing to complete. But it is respectfully submitted that the learned judge altogether failed to appreciate the true nature of the vendor's obligation to show a good title. We have seen that in the same case he overlooked the difference between *showing* title upon the face of the abstract delivered and *proving* title by production of the proper evidence; above, p. 166, n. (n). Both of these obligations ought properly to be performed by the vendor well before the day fixed for completion; as it is not until the title is proved that the purchaser can safely accept it, and before such acceptance he cannot safely prepare the draft conveyance; see below, Chap. XII. § 1; XIX. § 2. At common law too time was of the essence of the contract in all respects; so that it cannot be correct that at law the vendor performs the contract, though he shows no title on delivery of the abstract, if he can get it in just before the day fixed for completion. On the contrary, at common law the vendor was bound to have shown and verified a good title and to be ready to convey on that day; above, pp. 58, 59. It is submitted that the authorities above cited prove that the vendor's failure to show a good title on the face of his own abstract at the time of its delivery is at law such a breach of contract as discharges the purchaser from the duty of performing his part of the agreement for sale. It is not of course suggested that a purchaser claiming to rescind the contract at once for a breach of

with any requisition, but merely claims to repudiate the contract at once without further discussion, falls within the terms of the usual stipulation allowing the vendor to rescind (*m*). It has been definitely decided that, where the vendor has knowingly or recklessly (though without intention to defraud) made some material misrepresentation with respect to the property sold, so that he is unable to convey a property answering to that which he contracted to sell, he is not entitled to rescind the contract, under the common stipulation allowing him to rescind in case of his unwillingness to comply with some requisition, so as to deprive the purchaser of *his* rights either to rescind the contract for misrepresentation or to enforce its specific performance with compensation (*n*).

Where the vendor has knowingly or recklessly made a material misrepresentation.

If the stipulation gives the right to rescind in case of insistence on a requisition or objection as to *title* only, the vendor will not be enabled to rescind if the pur-

Objection as to matter of conveyance.

this kind cannot plead want of mutuality as a defence to the vendor's action for specific performance. All that is maintained is that the purchaser's right to rescind in such a case really rests on the common law principle that the vendor's obligation to show a good title at the time of the delivery of the abstract is a stipulation of which the *performance* is a condition precedent to the purchaser's liability under the contract; see below, Chap. XIV. § 1; XVIII. § 2. The vendor cannot successfully sue on the contract at law because of his default in performing this condition; and he will not be relieved in equity by being allowed to pursue the equitable remedy of specific performance, *except* where the vendor's breach is so trifling that the case is considered in equity to be a proper subject for specific performance with compensation at the vendor's suit (see above, p. 43, and below, Chap. XII. § 4), or *unless* the purchaser by his conduct in continuing negotiations for removing the objection he has taken elects to treat the contract as still subsisting; above, pp. 168, 169.

(*m*) See *Bowman v. Hyland*, 8 Ch. D. 588.

(*n*) *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, of which case it is submitted that the statement in the text, rather than the headnote in the Law Reports, gives the exact point; see the remarks made in the judgments (pp. 421, 423, 425), showing that

the vendors had in fact made what amounted in law to a wrongful misrepresentation: *Holtwell v. Seacombe* ib. 426, 432 *sq.* As to wrongful misrepresentation, see below, Chap. XIV. § 1; and as to the purchaser's right to specific performance with compensation, see above, pp. 43, 44, 65, 66; below, Chap. XII. § 4.

erett
huter,
20] 2 Ch. 240.

chaser insist on some requirement, which is a matter of conveyance, as the discharge of a mortgage (*o*). But it has long been usual expressly to extend the right to rescind to the case of objections as to matters of conveyance, and generally to objection in regard to any matter relating to the sale (*p*); and where the contract is so expressed, the Court will give effect to it (*q*). The usual condition expressly empowers the vendor to rescind, notwithstanding any negotiation or litigation in respect of the objection or requisition insisted on (*r*). Such negotiation on the vendor's part is therefore no waiver of his right to rescind (*s*). And the vendor is enabled to rescind, although the condition contain no reference to pending litigation, during the continuance of any proceedings by the purchaser either for specific performance or to enforce the contract at law, and whether by action or vendor and purchaser summons (*t*): but not after final judgment has been given in any such proceedings (*u*). If the vendor take proceedings to enforce the contract at law or in equity, he waives his right to rescind: though he may revert to it, if he procure his proceedings to be effectually discontinued at his own cost before they come on to be heard (*x*).

Waiver of objections or requisitions.

A purchaser may of course waive any objection or requisition which he has taken or made as to title or

(*o*) *Re Jackson and Oakshott*, 14 Ch. D. 851; see above, pp. 164, 165.

(*p*) 1 Dart, V. & P. 160, 5th ed.; 1 Davidson, Prec. Conv. 564, 614, 4th ed.

(*q*) *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458.

(*r*) Above, p. 72.

(*s*) *Duddell v. Simpson*, L. R. 2 Ch. 102; 1 Davidson, Prec. Conv. 564, 4th ed.; 470, 5th ed.; 1 Dart, V. & P. 161, 5th ed.; 183, 184, 6th ed.; 177, 7th ed.

(*t*) *Hay v. Smithies*, 22 Beav. 510; *Duddell v. Simpson*, L. R.

2 Ch. 102; *Isaacs v. Towell*, 1898, 2 Ch. 285. But the condition does not oust the jurisdiction of the Court to order the vendor to pay the costs of any such proceedings; *Re Spindler and Mear's Contract*, 1901, 1 Ch. 908.

(*u*) *Re Arbib and Class's Contract*, 1891, 1 Ch. 601.

(*x*) *Warde v. Dickson*, 5 Jur. N. S. 698; *Gray v. Fowler*, L. R. 8 Ex. 249; and see the case cited in the previous note, where the original summons was taken out by the vendor.

otherwise. Such waiver may be either express or implied from any acts or conduct inconsistent with the maintenance of the objection (*y*). The express waiver of an objection or requisition needs no comment: though it may be observed that the acceptance of the title shown by the abstract is no waiver of the right to require the verification of the abstract (*z*), or of any objection not disclosed by the abstract (*a*). Whether the waiver of any objection is to be implied from the purchaser's acts is a question of fact to be determined by the consideration of all the circumstances of the case (*b*). The evidence usually offered to establish an implied waiver is the performance, without raising any objection, of acts which the purchaser is not bound to perform, or which a prudent purchaser does not usually perform until a good title has been duly proved (*c*); like entry into possession, or payment of the whole or part of the purchase money (*d*). With regard to taking possession, if the contract for sale expressly or impliedly provide that the purchaser shall be let into possession before completion, no waiver can be implied from the fact of the purchaser so taking possession (*e*). And so it is if after the contract the parties agree that the purchaser shall go into possession without prejudice to his right to require a good title (*f*). But if the purchaser take possession, otherwise than under an express provision in the contract, after an abstract of title has been delivered, but before completion, that is *prima facie* a waiver of

(*y*) See *Simpson v. Sudd*, 4 De G. M. & G. 695; Sug. V. & P. 342 sq.; 1 Dart. V. & P. 430 sq., 5th ed.; 495 sq., 6th ed.; 508 sq., 7th ed.

(*z*) *Southby v. Hutt*, 2 My. & Cr. 207.

(*a*) *Blacklow v. Laws*, 2 Hare, 40, 47; Alderson, B., *Att.-Gen. v. Sitwell*, 1 Y. & C. 570.

(*b*) *Burroughs v. Oakley*, 3 Swanst. 159, 168.

(*c*) Above, p. 46.

(*d*) See the cases cited in the following notes; *Haydon v. Bell*, 1 Beav. 337.

(*e*) *Dixon v. Astley*, 1 Mer. 133, 134; *Stevens v. Guppy*, 3 Russ. 171, 183; *Bolton v. London School Board*, 7 Ch. D. 766.

(*f*) See *Burroughs v. Oakley*, 3 Swanst. 159, 169.

all objections to title (*g*) appearing on the abstract (*h*), though not of other objections (*i*). Waiver of objection may also be implied from the purchaser's conduct, though he were in possession when he bought, or took possession before completion under an express provision in the contract or without prejudice to his right to a good title; as if he remain a long time without raising any objection as to title, and exercise decisive acts of ownership over the lands sold, like letting them, making alterations in buildings or cutting timber, or accept time in regard to payment of the purchase money (*k*), or remain in possession after having had notice of an irremovable objection to the title (*l*). But as has been observed, in each case the whole of the circumstances must be considered, so that entry into possession or exercise of acts of ownership is by no means conclusive evidence of waiver. The question is, whether the purchaser intended to waive the particular objection. Such acts therefore are no evidence of waiver if accompanied by insistence on the objection. Thus where negotiations as to title were continued after the purchaser had both taken possession and acted as owner it was held that no waiver of objections to title could be implied (*m*). Long delay in raising objections may also be evidence of waiver (*n*).

Purchaser desiring to go on where the abstract shows an objection to the title.

Where the abstract shows an objection to the title which would justify the purchaser in rescinding the contract, but he desires to complete the sale, if possible,

(*g*) But not of objections, which are matter of conveyance (above, p. 164), as that the vendor shall release the property from mortgages; *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327.

(*h*) *Burnell v. Brown*, 1 J. & W. 168; *Bown v. Stenson*, 24 Beav. 631, 637.

(*i*) *Turquand v. Rhodes*, 37 L. J. Ch. 830.

(*k*) See *Fleetwood v. Green*, 15 Ves. 594; *Dixon v. Astley*, 1 Mer. 133; *Margravine of Anspach v. Noel*, 1 Madd. 310.

(*l*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320.

(*m*) *Burroughs v. Oakley*, 3 Swanst. 159, 169, 171.

(*n*) *Peggy v. Wisden*, 16 Beav. 239.

it is frequently advisable for him to claim at once that he is entitled to treat the contract as broken and recover his deposit and expenses, but to state that, subject and without prejudice to his strict rights in this respect, he is willing to buy the property described in the contract at the price therein mentioned, if the objection can be removed, and to make provisional requisitions accordingly. It is thought that if he so reserve his rights, the vendor cannot rescind under the common condition, if any requisition so made prove unwelcome (*o*). The purchaser must, however, bear in mind that in taking this course he gives the vendor the opportunity of retiring from the bargain, though only on the terms of returning the deposit, if any, and paying the purchaser's expenses of investigating the title down to the date of the claim to repudiate the agreement (*p*), and he precludes himself from enforcing the specific performance of the contract. But in most cases the vendor's desire to obtain the contract price for his land, and his anxiety to avoid paying the purchaser's expenses, are sufficiently great to make the course suggested effective.

(*o*) See above, pp. 37, 168, 169, 184—187.

(*p*) See below, Chap. XIX. § 2. If after this date the parties negotiate but fail to arrive at an

agreement to complete the sale, the purchaser cannot of course recover his expenses of such subsequent negotiation.

CHAPTER VI.

OF STIPULATIONS LIMITING THE OBLIGATION TO
SHOW A GOOD TITLE.

The statutory
limitations.

WE will now turn our attention to various particular points, which constantly arise in advising on title. And first, as to the effect of stipulations limiting the vendor's obligation to show a good title. We will begin by remarking that the enactment substituting forty years for sixty, in the absence of stipulation to the contrary, as the time of commencement of title (*a*) appears to alter the rule of law on this point rather than to introduce into open contracts a new term depending for its efficacy on the contracting parties' consent. So that where a vendor shows forty years' title, he is considered to show title for the full period required by law, and the purchaser's rights are not regarded as being limited by special stipulation (*b*). But the other statutory limitations of the purchaser's right to require a good title do not appear to have the like effect. Thus the enactment in the Vendor and Purchaser Act, 1874 (*c*), removing the necessity of showing the freeholder's title on the grant or assignment of a lease, has been held to have no greater force than a special stipulation in the contract to the same effect, and so not to exempt the grantee or assignee of the lease from receiving constructive notice of the lessor's title (*d*). And, as we shall see,

(*a*) Stat. 37 & 38 Vict. c. 78, s. 1; above, pp. 100, 101.

(*b*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11; above, p. 101; *Re Cox and Neve's Con-*

tract, 1891, 2 Ch. 109, 117, 118.

(*c*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 1); above, pp. 100—102.

(*d*) *Putman v. Harland*, 17 Ch. D. 353, 359.

the provisions of the Conveyancing Act of 1881 (*e*), exonerating the vendor of lands held by underlease less than forty years old from the obligation of showing the title to any leasehold reversion, and relieving a vendor of enfranchised copyholds of the necessity of showing the title to make the enfranchisement, receive the same construction as special stipulations in similar terms. The rule fixing forty years before the date of the contract as the time of commencement of title is, as we have seen (*f*), very frequently superseded in practice by a special stipulation that the title shall commence with some instrument of more recent date. But whether the period for which title has to be shown be defined by the general rule or by special stipulation, the vendor's obligation is subject to the further limitation introduced into contracts for sale by sect. 3, sub-sect. 3 of the Conveyancing Act, 1881 (*g*). This enactment, the exact effect of which it is of the first importance to understand, runs as follows:—

“ A purchaser of any property shall not require the production, or any abstract, or copy, of any deed, will, or other document dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document,

Sect. 3 (3) of
Conveyancing
Act, 1881.

(*e*) Stat. 44 & 45 Vict. c. 41,
s. 3 (1, 2); above, pp. 100, 101.

(*f*) Above, pp. 17, 84.

(*g*) Stat. 44 & 45 Vict. c. 41.

forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise."

The incorporation or exclusion of these provisions in or from the contract is, however, a matter depending on the expression of the intention of the parties (*h*). And it is enacted (*i*) that nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section or any of them, specific performance of the contract would not be enforced against him by the Court. The statutory provisions therefore have no greater force than express stipulations to the same effect, and will receive the same construction as such stipulations (*j*). We have already noticed the manner in which special conditions of sale are construed in actions for specific performance (*k*). We will now show particularly in what manner the effect of the above provisions is practically limited, notwithstanding the sweeping character of the expressions used therein.

The effect of
the above
enactment.

The first observation to be made is that this enactment is no qualification of the main rule that the vendor must show a good title, that is, that he must prove his right to convey what he sold. It refers entirely to the subordinate rule that the title for the last forty years, or whatever less period may be agreed upon, shall *prima facie* be evidence of a good title (*l*). If therefore the

(*h*) Sect. 3, sub-s. 9.

261, 272; 16 Q. B. D. 778.

(*i*) Sect. 3, sub-s. 11.

(*k*) Above, pp. 38, 39.

(*j*) *Nottingham Patent Brick and Tile Co. v. Butler*, 15 Q. B. D.

(*l*) Above, pp. 95, 96.

title shown in accordance with the agreement be defective, as where it discloses incumbrances irremovable without other persons' consent (*m*), the purchaser is not precluded by the above enactment from objecting to the title, notwithstanding that the incumbrances were created before the time fixed for the commencement of title. The leading authority for this is *Phillips v. Caldcleugh* (*n*). In that case, the plaintiff contracted to purchase of the defendants a house described as a freehold residence, subject to certain conditions of sale, and paid a deposit. The 5th condition provided that the abstract of title to the property should commence with a conveyance dated the 17th of April, 1860, and no purchaser should investigate or take objection in respect of the title prior to the commencement of the abstract. By the deed of the 17th of April, 1860, as abstracted, the premises were conveyed to Matthews and Beckett in fee subject to the covenants and conditions contained in an indenture of the 2nd of March, 1850, recited therein. The plaintiff made this requisition—"The vendors must show, notwithstanding any of the conditions of sale, that the covenants and conditions contained in the indenture of the 2nd of March, 1850, referred to in the first abstracted deed, do not in any manner affect the property, and that the purchaser incurs no liability in respect of them." To which the defendants made answer, "The purchaser's solicitors are referred to the 5th condition of sale." After some fruitless negotiations the purchaser brought an action to recover his deposit. And it was held that he was entitled to recover it. For the plaintiff had contracted to purchase a freehold house, which must mean a freehold free from all incumbrances; and the abstract delivered only showed a title to a freehold house incumbered by certain covenants. And it was held

*Phillips v.
Caldcleugh.*

(*m*) Above, p. 165.

(*n*) L. R. 4 Q. B. 159.

*Nottingham
Patent Brick
and Tile Co.
v. Butler.*

that the 5th condition of sale did not prevent the purchaser from taking this objection: for it merely restricted the length of time for which the purchaser could require a title to be shown; and did not absolve the vendor from the obligation of showing a good title to the freehold of the property sold, free from incumbrances, from the time at which it had been agreed that the title should commence. It should be noted that this case was an action at law brought before the Judicature Acts, and in no way depended upon any of the equitable doctrines peculiar to the granting or refusing the specific performance of a contract (o). Again, in *Nottingham Patent Brick and Tile Co. v. Butler* (p), land was bought under a contract providing that the title should commence with an indenture dated the 20th of May, 1868, and incorporating the above enactment, and further providing that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. The vendor's solicitor represented to the purchaser, before the contract was signed, that the property was not subject to restrictive covenants: but the purchaser, after having signed the contract, discovered from other sources than the vendor that there were restrictive covenants affecting the property and created by a title deed of earlier date than the 20th of May, 1868. He thereupon refused to complete, and brought an action to recover his deposit. The vendor counterclaimed the specific performance of the contract, and alleged in the Court of Appeal that he himself had bought without notice of the restrictive covenants, and so could give the purchaser an unincumbered title. The vendor was, however, aware of the existence of the covenants, having discovered them, as he said, by looking, after his purchase, at the deed creating them. It was held both by Wills, J. and the

(o) Above, pp. 37, 38.

(p) 15 Q. B. D. 261; 16 Q. B. D. 778.

Court of Appeal that the purchaser was not precluded by the above provisions of the Conveyancing Act from insisting on his right to an unincumbered freehold title. The vendor's claim for specific performance was rejected, not only on the ground of his solicitor's misrepresentation, but also because the vendor, knowing of the defect in the title, did not call the purchaser's attention thereto in the contract, and so could not avail himself of the special condition that the property was sold subject to anything affecting the same (*q*). His claim to oblige the purchaser to take a title from him as a *bonâ fide* purchaser for value without notice of the covenants was dismissed for the reason that the fact, that he was such a purchaser, was disputable, and Courts of Equity regard titles depending on proof of facts, which may be immediately disputed and so land the purchaser in litigation, as too doubtful to force upon an unwilling purchaser. The return of the deposit was also ordered in both Courts: but the Court of Appeal rested the purchaser's right to this relief entirely upon the misrepresentation by which he was induced to enter into the contract; without which the Court considered that he would have been bound at law by the contract. Another case illustrating the effect of the above enactment and depending on the same principle as the case last cited is *Re Marsh and Earl Granville* (*r*). It was there stipulated that the title to a certain freehold estate should commence with a deed less than forty years old. This deed turned out to be a voluntary conveyance: but no mention of this fact had appeared in the conditions of sale. It was held in a vendor and purchaser summons taken out by the vendor that the purchaser was justified in refusing to complete the contract, unless title were shown for the full period of forty years; notwithstanding that the conditions of sale provided

*Re Marsh and
Earl Gran-
ville.*

(*q*) See above, pp. 73, n. (*l*), 175, 176. (*r*) 24 Ch. D. 11.

that the title earlier than the date of the voluntary conveyance should not be investigated or objected to. This was so decided on the ground that conditions curtailing a purchaser's right to require a good title as defined by law must be fair and explicit, or the vendor shall not enforce the specific performance of the contract according to the limiting conditions. And the Court further considered that, on a stipulation for the commencement of title with a deed *less* than forty years old, the purchaser is entitled to assume that the agreed root of title is a conveyance for valuable consideration. As we have seen (s), this judgment does not appear to oblige a vendor to put forward such a conveyance as the root of title when he agrees to show title for the full period required by law. In all other respects, however, the principles of *Phillips v. Caldeleugh* and *Re Marsh and Earl Granville* are constantly applicable whenever it is stipulated that title shall commence with an instrument of a particular date, whether that date be or be not less than forty years before the contract. And whenever such a deed fails in any of the requisites of a good root of title (t), the purchaser is entitled to call for further evidence to supply the defect; and he is not precluded by the above enactment from insisting on this right to further evidence, even though proof can only be supplied by the investigation of the earlier title. For as we have seen (u), the vendor's obligation is to show title to the whole estate contracted to be conveyed in the lands sold throughout the entire period of forty years or such less time as may be agreed on. He must therefore prove title to the whole of such estate at the beginning and thenceforward until the end of such period. Thus on the sale of freeholds he must prove a seisin in fee free from incumbrances at the commencement of and throughout the number of years

(s) Above, p. 109.

(t) Above, p. 106.

(u) Above, p. 107.

for which he has bound himself to show title; and he incurs a similar obligation on the sale of copyholds (*r*) or leaseholds (*w*).

If a vendor of his own accord allow the purchaser to inspect title deeds of earlier date than the time agreed on for commencement of title, and the purchaser so discover a defect in the title, the latter may insist on such defect as a bar to specific performance, notwithstanding the provisions of the above enactment (*x*).

Vendor disclosing a defect of title.

Any misrepresentation as to facts, however innocently made, will preclude the vendor from enforcing the specific performance of the contract with the limitations imposed by the above enactment. On this point the leading case is now *Re Banister, Broad v. Muntton* (*y*), where, upon the sale of a farm by order of the Court, a condition was made requiring the purchaser to assume that E. B. was seised of and entitled to the entire property sold in fee simple in possession, free from incumbrances, in 1835 and up to and at her death, stating that it was not known and could not be explained how E. B. acquired the property, and expressly stipulating that no other title than as above should be required or inquired into. It was shown that it was within the knowledge of the vendor that E. B. was not seised of the property free from incumbrances in 1835, and how E. B. acquired the property. The vendor was held to have acted in perfect good faith, inasmuch as he had furnished a statement of the facts known to him, upon which the condition had been drawn by one of the conveyancing counsel of the Court. But it was held that, the statement which the purchaser was required to

Misrepresentation.

Re Banister, Broad v. Muntton.

(*r*) *Sellick v. Trevor*, 11 M. & W. 722.

(*w*) *Waddell v. Wolfe*, L. R. 9 Q. B. 515.

(*x*) *Smith v. Robinson*, 13 Ch. D. 148.

(*y*) 12 Ch. D. 131; see also *Harnett v. Baker*, L. R. 20 Eq. 50.

assume as correct being untrue to the knowledge of the vendor, the former had been induced to make the contract by a misrepresentation; for he was entitled to presume that what was so stated was true. It was considered therefore that the vendor could not oblige the purchaser to take a title as limited by the condition, and the purchaser might decline specific performance unless the vendor would show a good title irrespective of the condition. But it was declared that the purchaser, having bought under such a condition, was entitled to require a good holding title only and not a good marketable title.

Construction
of express
stipulations
before the
Conveyancing
Act, 1881.

The reader will observe that, as the above enactment has no greater force in binding either party than an express stipulation to the same effect, it is construed with the aid of decisions given before the Act upon the construction of contracts containing similar express provisions. In arriving at such decisions, the question generally considered was whether the terms of the contract simply exonerated the vendor from the obligation of showing or answering any requisition as to the title prior to some specified time (*z*), or whether they bound the purchaser to refrain altogether from investigating such prior title and so obliged him to accept the title shown without objection, even though a ground of objection were ascertained from other sources than the vendor (*a*). It appears from the above-mentioned case of *Nottingham Patent Brick and Tile Co. v. Butler* (*b*) that the stipulation made by sect. 3, sub-sect 3, of the Conveyancing Act (*c*) does not bind the purchaser to refrain from investigating the earlier title in other

(*z*) *Shepherd v. Keatley*, 1 C. M. & R. 117; *Darlington v. Hamilton*, Kay, 550; *Waddell v. Wolfe*, L. R. 9 Q. B. 515.

(*a*) *Hume v. Bentley*, 5 De G. & Sm. 520; *Waddell v. Wolfe*,

L. R. 9 Q. B. 515, 519; *Jones v. Clifford*, 3 Ch. D. 779, 790.

(*b*) 16 Q. B. D. 778; above, p. 196.

(*c*) Above, p. 193.

sources than the vendor; and special stipulation must be made, if such inquiry by the purchaser is intended to be precluded. The reader will have noticed, however, that this enactment expressly precludes objection as well as inquiry by the purchaser with regard to the earlier title; and it may be asked whether these expressions are absolutely without effect. They certainly do not preclude the purchaser from resisting specific performance on account of any objection to the title, which was known to the vendor when he made the contract, but not disclosed thereby (*d*). And, as we have seen (*e*), they do not, even at law, preclude a purchaser from objecting to a title subject to a present defect, which is apparent on the face of the abstract, though arising out of the earlier title. But if a good title were shown by the abstract for the time for which title was agreed to be shown, and there were no active misrepresentation on the vendor's part (*f*), it appears that a purchaser would not be allowed to rely upon an objection barred by the letter of the above enactment in proceedings to recover his deposit (*g*). And if the objection arising out of the earlier title were unknown to the vendor when he sold, the case is altogether different and is not covered by any of the authorities cited; and it must not be assumed, without argument, that in such circumstances the purchaser would not be precluded by the above enactment from resisting specific performance, if he discovered the objection elsewhere (*h*).

(*d*) *Nottingham Patent Brick and Tile Co. v. Butler*, 16 Q. B. D. 778, 786, 789.

(*e*) Above, p. 195.

(*f*) See above, p. 197.

(*g*) See above, pp. 37, 88, and cases stated below, pp. 204—207.

(*h*) On this point see the writer's argument in his Conveyancing Statutes, Appendix A., p. 531, written before the case of

Nottingham, &c. Co. v. Butler. The position there taken by the writer with regard to defects known to the vendor (p. 535, last sentence) is justified by the judgment of the C. A. in this case; 16 Q. B. D. 786, 789. As to the position of a vendor selling honestly and in good faith without knowledge of a defect in his title, see *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211.

Special stipulation as to title.

It is of course open to any vendor by special stipulation either to exonerate himself altogether from the obligation of showing title or to bind the purchaser to accept any partial or defective title; and if such stipulations be fair and explicit, so that the purchaser cannot reasonably be misled with regard to the title he is contracting to take, they will be enforced by the Court in granting specific performance at the vendor's suit (*i*). Thus purchasers have been ordered to perform specifically contracts obliging them to take such title as the vendors had (*k*). Such a stipulation precludes objection to the vendor's title, but does not relieve him of the obligation of abstracting and verifying it (*k*). But a stipulation that the vendor shall not be required to show any title, whether to the whole or to any part of the lands sold, is undoubtedly valid, and exempts him from the necessity of abstracting or otherwise proving his title (*l*). As we have seen (*m*), however, the last-mentioned stipulation alone would not preclude objection to the title on account of a defect discovered from other sources; but if words were added obliging the purchaser to refrain from any independent investigation of the title, he would certainly be bound thereby, both at law and as regards the specific performance of the contract. On this point the leading authority is *Hume v. Bentley* (*n*), where leaseholds were sold under a condition that the lessor's title would not be shown and should not be inquired into (*o*). The vendor sued for specific performance, and on the usual reference (*p*) as

Hume v. Bentley.

(*i*) Above, p. 62; see *Re Haediche and Lipski's Contract*, 1901, 2 Ch. 666.

(*k*) *Freme v. Wright*, 4 Madd. 364; *Keyse v. Hayden*, 20 L. T. O. S. 244; *Hume v. Pocock*, L. R. 1 Ch. 379, 385. See also *Wilmot v. Wilkinson*, 6 B. & C. 506; *Tweed v. Mills*, L. R. 1 C. P. 39; *Sug. V. & P.* 337; 1 Dart, V. & P. 150, 151, 5th ed.; 168-170,

6th ed.; 163-165, 7th ed.; 1 Davidson, Prec. Conv. 544, 4th ed.; Fry, Sp. Perf. § 1323, p. 591, 3rd ed.; p. 565, 4th ed.

(*l*) See *Southby v. Hutt*, 2 My. & Cr. 207, 212, 213.

(*m*) Above, p. 200.

(*n*) 5 De G. & Sm. 520; 16 Jur. 1109.

(*o*) See above, p. 200.

(*p*) Above, p. 166, n. (*n*).

to title, the purchaser took the objection that the lease, which had been granted by a canal company, was void, as it appeared from the Acts of Parliament incorporating the company that the company had no power to acquire land or grant leases. It was held however that a vendor may lawfully stipulate that the purchaser shall accept the title shown without objection or inquiry; and that the words used amounted to such a stipulation and precluded the purchaser from looking into the lessor's title for any purpose. And the purchaser's objection was disallowed. As we have already noted (*q*), when it is intended that the purchaser shall take lands sold subject to some particular defect of title known to the vendor, such as an easement, restrictive covenants, a mortgage or a rentcharge, the stipulation obliging him to do so must clearly call his attention to the incumbrance, to which he is to submit: otherwise he will not be bound to specific performance according to the letter of the contract. The cases to which we have referred upon considering the effect of sect. 3 (3) of the Conveyancing Act of 1881 (*r*) also illustrate the effect given at law and in equity to special stipulations as to title.

Here we may notice a case in which a purchaser may be obliged to take lands subject to some defect of title or particular incumbrance, without any written stipulation to that effect. Where the vendor's obligation to show a good title is not an express term of the contract, but is merely implied, as in the case of an open contract (*s*), it is open to him to prove that the purchaser bought with notice (though given by word of mouth only) that a good title could not be made, either wholly or partially; and the vendor will then be exonerated from showing title to the extent indicated by such

A purchaser with notice that a good title cannot be made.

(*q*) Above, pp. 73. n. (*t*), 176, 197.

(*r*) Above, pp. 195 *sq.*

(*s*) Above, p. 32.

notice (*t*). But where the vendor has expressly contracted to show a good title, he is not permitted to modify the terms of his written agreement by giving oral evidence of any such notice (*u*).

Difference in purchaser's position when resisting specific performance, and when seeking to recover deposit.

Best v. Hamand.

We will now consider the authorities establishing the difference, to which we have before referred (*x*), in the position of a purchaser under a special contract as to title when he is resisting specific performance in equity and when he is seeking to recover his deposit at law. In *Best v. Hamand* (*y*), a railway company sold land as superfluous land under conditions that the purchasers should assume (without proof) that everything had been done by the company to enable them to sell the land as surplus land, and that the deposit should be forfeited if the purchasers failed to comply with the terms of the agreement. The purchaser discovered from other sources that some of the adjoining owners had not waived their right of pre-emption; and insisted on this objection to the title (*z*). The vendors thereupon claimed the deposit as forfeited; and it was held by the Court of Appeal, reversing the decision of Hall, V.-C., that the purchasers were not entitled to recover it, as they had in effect contracted to take the vendor's title without objection on this point, and had not therefore abided by the terms of the contract. But if in this case the vendors had sued for specific performance, it

(*t*) *Ogilvie v. Foljambe*, 3 Mer. 53, 64; *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327; *Ellis v. Rogers*, 29 Ch. D. 661, 666, 671, 672; Fry, Sp. Perf. § 377, p. 172, 3rd ed.; pp. 161, 162, 4th ed. It appears that the case of *Re Highett and Bird's Contract*, 1903, 1 Ch. 287 (as to which see below, Chap. X. § 2), is not to be taken as conflicting with this rule; see Romer, L. J., *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226, 231.

(*u*) *Cato v. Thompson*, 9 Q. B. D. 616.

(*x*) Above, pp. 38, 88.

(*y*) 12 Ch. D. 1.

(*z*) Under sect. 128 of the Lands Clauses Act, 1845 (Stat. 8 & 9 Vict. c. 18), before superfluous land can be sold by a railway company, it must be offered to the owner of the lands from which it was originally severed, and in default of this, to the owners of the adjoining lands.

appears that the purchasers might have resisted their claim, except on condition of the vendors showing that they could give at least a good holding title; for the vendors, having required the purchasers to assume the truth of a statement which the vendors knew to be false, had made a misrepresentation sufficient to preclude them from enforcing specific performance according to the letter of the contract (a). So in *Nottingham Patent Brick and Tile Co. v. Butler* (b), we have seen that land was bought subject to the condition that it was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, and it was held that, the land being subject to restrictive covenants known to the vendor but not disclosed at the time of sale, the vendor could not enforce specific performance: but it was intimated that the purchaser would not have been able to recover his deposit, if he had not bought on the faith of the vendor's solicitor's representation that the land was free from such covenants. Again, in *Re Davis to Carey* (c) property was sold as "leasehold business premises" under conditions that the title should commence with the conveyance to the vendors, and that no objection should be made in respect of anything contained in the lease. No information as to the contents of the lease was given and no opportunity of inspecting it. The purchaser discovered after the sale that the lease contained covenants prohibiting the tenant from carrying on any trade or business on the premises. Stirling, J., in a vendor and purchaser summons taken out by the purchaser, held that, regard being had to the sale of the property as business premises, the purchaser was entitled to have an assignment of property where he could carry on any business (d), and so the

*Re Davis to
Carey.*

(a) *Re Banister, Broad v. Munton*, 12 Ch. D. 131; above, p. 199.
(b) 16 Q. B. D. 778; above,

p. 196.

(c) 40 Ch. D. 601.

(d) See above, p. 43.

*Re National
Provincial
Bank of Eng-
land and
Marsh.*

vendor had not shown such a title as the purchaser was compelled to accept. But he declined to order the return of the deposit, pointing out that *Best v. Hamand* (e) showed that the right to recover a deposit at law was not governed by the same considerations as the right to resist specific performance in equity. He therefore left the purchaser to bring an action at law, if so advised, for the return of his deposit. In *Re National Provincial Bank of England and Marsh* (f), land was sold under the condition that the title should commence with a conveyance dated in 1869, and the prior title should not be required, investigated or objected to. The purchaser discovered from other sources that the grantor in the conveyance of 1869 derived title under a will which, the purchaser was advised, conferred a life estate only. The purchaser insisted on this objection, and took out a vendor and purchaser summons for the return of his deposit. North, J., admitted that the vendors might have a difficulty in enforcing specific performance, but held that the purchaser had no right to the return of his deposit, as the stipulation plainly barred independent investigation of and all objection to the earlier title (g), and the purchaser had not therefore observed the terms of the contract. Finally, in *Re Scott and Alvarez's Contract* (h), land held by underlease was sold under a condition that the purchaser should make no objection or requisition in respect of the intermediate title between the underlease and an assignment thereof in 1891, but should assume that such assignment vested in the assignees a good title for the residue of the term. The purchaser's solicitor nevertheless asked questions as to this intermediate title of the vendor's solicitor, who gave him certain information tending to cast suspicion on such title. The vendor's solicitor asserted that this

*Re Scott and
Alvarez's
Contract.*

(e) Above, p. 204.
(f) 1895, 1 Ch. 190.

(g) Above, p. 202.
(h) 1895, 1 Ch. 596; 2 Ch. 603.

was done without prejudice to the special condition. The purchaser maintained that, as the vendor had given information as to the intermediate title, he could not oblige the purchaser to accept the title shown without clearing up the suspicions raised (*i*). The purchaser took out a vendor and purchaser summons in support of this contention, which prevailed with Kekewich, J., but was disallowed in the Court of Appeal. The Lords Justices held that, to enable the purchaser to escape from the stringent condition into which he had entered, it was not enough to show that the title was suspicious, but he must prove it to be bad; and as it was made to appear to them that the purchaser's main objection was removed by the Statute of Limitations, they held that he had failed in such proof. After this, the purchaser discovered that gross frauds had been committed with respect to the intermediate title, and that several documents, on which the vendor's title depended, were forgeries; and he declined to complete the purchase. The vendor, who was not in any way implicated in the frauds, then brought an action for specific performance, to which the purchaser by leave counterclaimed to review the order of the Court of Appeal made in the summons, on the ground of the subsequent discovery of fresh material facts. Kekewich, J., not only dismissed the vendor's action for specific performance, but ordered him to return the deposit. But, on the case being again taken to the Court of Appeal, it was considered that at law the purchaser was strictly bound by the contract into which he had chosen to enter, and could not therefore recover his deposit, as there had been no breach of contract by the vendor. But it was declared that the specific performance of the contract in equity depended on different considerations; and on this point the judgment was affirmed for the reason that, as the vendor

i See above, p. 199.

had no holding title at all, but was liable to instant ejectment, his title was not such as the Court would oblige an unwilling purchaser to take.

Recovery of deposit under agreement that title shall commence with some specified instrument, which turns out not to be a good root of title.

The above decisions raise a question as to the purchaser's right to recover his deposit, where he has entered into a contract that the title shall commence with a particular instrument less than forty years old (*k*), and it turns out that this is not a good root of title. What is the effect at law of an agreement that the title shall commence with an instrument, of which the nature is not specified? Take the case of a sale of freeholds in fee subject to a condition that the title shall commence with a particular deed dated twenty years before the contract, and without any stipulation precluding investigation of the earlier title other than is contained in the Conveyancing Act of 1881 (*l*). Have the parties agreed that that deed, whatever it may be, shall be the root of title, or have they merely stipulated that proof of title as from the date of that deed shall be accepted, instead of proof of forty years' title, as proof of a good title? (*m*) It is submitted that the latter is the true meaning of the condition, and that it does not exonerate the vendor from the obligation of proving title to the whole estate contracted to be sold at the beginning as well as at the end of the period for which title is to be shown (*n*). Thus if the deed mentioned in the condition should turn out to be merely a lease for years, or the conveyance of an equity of redemption, the purchaser would be entitled to call for further evidence of title (*o*). And it is submitted that in requiring such evidence he would not commit any breach either of the express condition or of the stipulation incorporated in the contract by the Conveyancing Act. For

(*k*) Above, p. 61.

(*l*) Stat. 44 & 45 Vict. c. 41, s. 3 (3); above, p. 193.

(*m*) See above, pp. 95—98.

(*n*) See above, pp. 108, 109.

(*o*) Above, pp. 198, 199.

he would not be asking for production of evidence of the title *prior* to the time stipulated for commencement of title; which the statutory stipulation precludes him from demanding (*p*). What he would really be requiring is proof of the title *at the date* of the specified deed to such part of the estate contracted to be sold as was not dealt with by that deed. It is submitted that a more stringent stipulation than the supposed condition would be necessary to exonerate the vendor from the obligation of producing such proof; and further that the vendor cannot be discharged from this obligation merely because the only available evidence happened to be the production of the earlier title (*q*). If this view be correct, the vendor would not be entitled to retain the deposit if he refused to furnish the evidence required. A distinction however must be drawn between the instance given above and a case where the nature of the instrument, with which the title is to commence, is plainly described. Thus if it were agreed that the title should commence with an Indenture of such a date, "being a settlement on marriage of the property sold, subject to certain mortgages therein recited," there would be good ground to contend that the purchaser agreed to accept that deed as the root of title. Again, a difference is to be observed in cases like *Re Marsh and Earl Granville* (*r*), where it is agreed that the title shall commence with a specified deed, and that deed does show title to the whole estate contracted for, but it is objected to for some other reason, as because it is a voluntary conveyance. In that case the purchaser did not abide by the contract in requiring evidence of the earlier title; and it does not appear that he could have recovered his deposit. The proceedings were throughout treated as a vendor's action for specific performance. And the

(*p*) Above, p. 193.

(*q*) See *Phillips v. Caldclough*,

above, p. 195.

(*r*) 24 Ch. D. 11; above, p. 197.

doctrine there laid down, that a purchaser agreeing that the title shall commence with a deed less than forty years old is entitled to assume that the deed is a conveyance for valuable consideration (*s*), is applicable only in proceedings for specific performance and not in an action on the contract at law. As previously recommended (*t*), purchasers buying by private contract should avoid raising any question as to the retainer of the deposit by requiring the vendor to guarantee the instrument, with which the contract is to commence, to be a good root of title.

Purchaser under usual condition as to identity requiring further evidence.

Again, it may be asked whether a purchaser will be entitled to recover his deposit, if, having bought under the usual condition as to evidence of identity (*u*), he require further evidence of identity on the ground that the descriptions in the title deeds fail, either wholly or partially, to prove the identity of the property bought with that to which the deeds relate. It appears however that the usual condition (*u*) as to evidence of identity does not altogether discharge the vendor from the obligation of proving identity; it merely saves him from the necessity of giving evidence of identity independent of the title-deeds. And if the deeds themselves fail to show identity, it does not appear that the vendor performs his contract at law (*v*). If so, he cannot claim to retain the deposit.

Course to adopt in making requisitions.

The proper course for the purchaser's counsel to adopt in matters of this kind appears to be to require the vendor, in the first instance, to show such a title and furnish all such evidence as he would be obliged to show or produce in an action for specific performance at his own suit. And the purchaser's advisers should

(*s*) See above, pp. 109, 198.

(*u*) Above, pp. 65, 72.

(*t*) Above, p. 59.

(*v*) See the authorities cited in note (*b*) to p. 66, above.

endeavour to secure compliance with such requisitions by their diplomatic conduct of the negotiations. If this fails to attain its object, the purchaser should be careful to insist only on such requisitions as the vendor is obliged to comply with at law. And he should withdraw all requisitions for any evidence of title, which the vendor would have to produce to obtain specific performance at his own suit, but need not show in order to discharge his contract at law. As we have seen (x), unless the vendor seek actively to enforce the specific performance of the contract, the purchaser has no means of obliging him to furnish such evidence.

It has been shown (y) that a condition of sale, requiring the purchaser to assume without proof the truth of some fact or facts stated, is not binding, as regards the specific performance of the contract, if the vendor know the statement made to be untrue. But if the vendor believe the statement made to be true and have no reason to suppose that it is incorrect, the condition is fully binding on the purchaser, although it do not appear from the contract what defect of title the assumption required is intended to cover (z).

Conditions
requiring
assumptions
of fact.

If a purchaser buy under conditions limiting his right to inquire into the vendor's title, he will of course have no protection against any *legal* estates or rights, adverse to the vendor's interest, which might have been discovered by a complete investigation of the title. But this liability arises from the fact that *legal* estates or interests in land are rights directly enforceable against the land into whosoever hands it may come (a); and it is no defence against persons seeking to enforce

Position of
purchaser
buying under
special con-
ditions as
against
persons
claiming
adversely to
the vendor.

(x) Above, p. 88.

(y) Above, pp. 199, 200.

(z) *Re Sandbach and Edmondson's Contract*, 1891, 1 Ch. 99; *Blaxberg v. Keeses*, 1906, 2 Ch.

175.

(a) See Wms. Real Prop. 2, 3, 65, 181, 571, 21st ed.; below, Chap. XI. § 2 (Assignment by Party to the Contract).

Purchaser not investigating title has constructive notice of equities which he might have discovered by inquiry.

such rights that the purchaser made the fullest investigation of the vendor's title. With regard to *equitable* estates or interests adverse to the vendor's title, the case is different; and if the purchaser obtain the legal estate from the vendor without notice of such estates or interests he will not be bound thereby (*a*). But a purchaser, who buys under conditions limiting his right to investigate the title, has constructive notice of all equitable incumbrances, which he would have discovered if he had inquired into the vendor's title for the period during which the title is required to be shown by law (*b*). For it is considered that a purchaser is bound to inquire into his vendor's title; and he is not allowed to escape the consequences of such inquiry, as regards notice of equities apparent on the face of the title, by contracting not to investigate the title. The reason of this is obvious. If a purchaser under restrictive conditions were able to plead purchase of the legal estate without notice against a prior equitable incumbrancer, it would always be in the power of any one who held land subject to an equitable incumbrance, to deprive the incumbrancer of his right by a sale under conditions prohibiting inquiry into title; and a purchaser under special conditions is supposed to take all risks and to pay a diminished price in consequence (*c*).

(*a*) See last note.

(*b*) *Worthington v. Morgan*, 16 Sim. 547; *Peto v. Hammond*, 30 Beav. 495; *Wilson v. Hart*, L. R. 1 Ch. 463; *Carter v. Williams*, L. R. 9 Eq. 678; *Patman v. Harland*, 17 Ch. D. 353; *Re Cox and Neve's Contract*, 1891, 2 Ch. 109, 117, 118; C. A., *Re Nisbet and Potts' Contract*, 1906, 1 Ch. 386, 404, 408, 410 (but as to the decision in this case, see the writer's criticism in 51 Sol. J. 141, 155); *Perham v. Kempster*, 1907, 1 Ch. 373, 379; see also *Oliver v. Hinton*, 1899, 2 Ch. 264; *Berwick v. Price*, 1905, 1 Ch. 632; *Walker v. Limon*, 1907, 2 Ch.

104; below, Chap. VIII. § 1.

(*c*) See the cases cited in the previous note. Fry, J., appears to have lost sight of these principles in holding in *Kettlewell v. Watson*, 21 Ch. D. 685, 708, that persons who purchased very small pieces of land without investigating the title, were not affected with constructive notice of an equitable incumbrance, which the usual investigation of title would have disclosed. There was no appeal from his decision on this point: but his views do not appear to have been accepted by the C. A. See 26 Ch. D. 501, 508.

CHAPTER VII.

OF DEVOLUTION ON DEATH.

DEVOLUTION of lands on death is a fact of title which is constantly brought before the conveyancer. As the law on this subject has lately been altered it is deserving of special consideration. We will begin by giving a short summary of the law in force before the 1st of January, 1898, when the Land Transfer Act, 1897 (*a*), took effect. Devolution on death before 1898.

The first thing to be remembered in considering who were rightly entitled to succeed to lands on a former owner's death is the law of dower and curtesy. For the purpose of the investigation of title, it may still be necessary to have regard to the old law of dower, which continued to regulate the dower of all widows who were married before or on the 1st of January, 1834 (*b*). It will be remembered that, at common law, the wife's dower was paramount to every alienation by the husband, whether in his lifetime or by will, of any lands on which the claim had attached : but that in modern times the wife's claim was generally prevented from attaching by the assurance of lands on a purchase to uses to bar dower (*c*). The dower of women married after the Dower and curtesy.
Dower.

(*a*) Stat. 60 & 61 Vict. c. 65; s. 14.
see sect. 25.

(*c*) See Wms. Real Prop. 322
(*b*) Stat. 3 & 4 Will. IV. c. 105, s. 7., 390, 21st ed.

1st of January, 1834, is governed by the Dower Act (*d*). This statute deprives the widow of dower out of any land, of which her husband has absolutely disposed in his lifetime or by will (*e*); and postpones her right to dower to all partial estates and interests and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable (*f*). It enables the husband to bar his wife's right to dower out of any land by declaration to that effect contained in any deed of his or by will (*g*), or to restrict her right to dower by his will (*h*); and it also deprives the widow of dower out of any land, in which her husband has devised any estate or interest for her benefit, unless a contrary intention be declared by his will (*i*). The general effect of these provisions is that a widow can only claim dower out of lands, which her husband has suffered to descend; and even out of such lands her right to dower may be barred, restricted or postponed (*k*). But it must not be forgotten, in advising on title, that on the death of a tenant of freeholds in fee intestate or on the death of a tenant in tail, his widow may still be entitled to dower.

(*d*) Stat. 3 & 4 Will. IV. c. 105.

(*e*) Sect. 4.

(*f*) Sect. 5. The opinion has been expressed that, notwithstanding the above words, the widow's dower is paramount to the claims of her late husband's creditors, who have not in his lifetime obtained a charge on his lands; Romilly, M.R., *Spyer v. Hyatt*, 20 Beav. 621; Wood, V.-C., *Jones v. Jones*, 4 K. & J. 361. In neither of these cases, however, was the expression of this opinion necessary to the decision. *Spyer v. Hyatt* was a case of freebench; and it had been previously decided that the Dower Act has no application

to freebench; *Smith v. Adams*, 18 Beav. 499; 5 De G. M. & G. 712; so Lord Romilly's *dictum* was peculiarly gratuitous. *Jones v. Jones* was the case of a mortgage by the husband. It is submitted that, according to the ordinary meaning of the words used in the Act, a man's lands are by stat. 3 & 4 Will. IV. c. 104, made "subject or liable" to his debts after his death, notwithstanding that his creditors have no charge thereon.

(*g*) Sects 6, 7.

(*h*) Sect. 8.

(*i*) Sect. 9.

(*k*) See Wms. Real Prop. 326, 327, 21st ed.

Curtesy at common law was of course an estate com-
mencing in the wife's lifetime on the birth of issue that
might inherit (*l*). But as regards estates of inheritance
held on trust for the wife's separate use or held by her
as her separate property under the Married Women's
Property Act, 1882, the husband has no right to posses-
sion or receipt of the rents and profits during his wife's
lifetime, and he can only claim an estate by the curtesy,
if entitled by the birth of issue, on the wife's death and
intestacy; and not in case she has disposed of the estate
in her lifetime or by will (*m*).

Curtesy.

Subject to the law of dower and curtesy, on the death
before the year 1898 of a tenant of freeholds who was
also the beneficial owner, his estate devolved as follows
according to its nature:—An estate in fee simple passed
directly to the devisee, if it should have been disposed
of by will (*n*), or in case of intestacy, to the heir of the
last purchaser (*o*). In case of a total failure of the heirs
of the last purchaser, the estate descended to the heir of
the person last entitled thereto (*p*): but if there were no
such heir, it escheated to the lord of the fee, and usually
to the Crown, in default of any mesne lord being able
to prove his title (*q*). It does not fall within the scope
of the present work to set out all the rules for the
descent of a fee to the heir of the last purchaser or
person last entitled (*r*): but the conveyancer may be
reminded of the interest given by the Intestates' Estates

Succession to
freeholds
after death
before 1898.

(*l*) See Wms. Real Prop. 307, 21st ed.

(*m*) Ibid. 316, 318; *Cooper v. Macdonald*, 7 Ch. D. 288; *Hope v. Hope*, 1892, 2 Ch. 336.

(*n*) Wms. Real Prop. 74–76, 244, 245, 260, 21st ed.

(*o*) That is, of course, under the Inheritance Act, 1833, regulating the succession on deaths occurring after the year 1833. On deaths before 1834, lands

descended according to the common law rules to the heir of the person last seised; Wms. Real Prop. 86, 227, 228, 21st ed.

p. This was by virtue of stat. 22 & 23 Vict. c. 35, ss. 19, 20, passed 13th August, 1859; Wms. Real Prop. 236, 21st ed.

q. Ibid. 55–58, 242.

(*r*) See for these Wms. Real Prop. 227 *sq.*, 21st ed.

Act, 1890 (*s*), to the widow in the real estate of any man dying intestate after the 1st of September, 1890, and leaving a widow but no issue. Estates tail, if not barred in the tenant's lifetime (*t*), descended to the heir in tail *per formam doni* (*u*). And where lands are subject to the custom of gavelkind or borough-English, it must not be forgotten that the descent of estates tail, as well as estates in fee simple, is regulated by the custom (*x*). Life estates of course cease on death: but estates *pur autre vie* passed, if devised, to the devisee, and otherwise either to the heir as special occupant, or if there were no special occupant to the deceased tenant's executors or administrators; and in the last-mentioned event they became distributable in the same manner as personalty (*y*).

Copyholds. Copyholds held beneficially in customary fee simple or tail may by special custom be subject to the widow's freebench or the husband's curtesy (*z*). Subject to these rights, copyholds held in fee are devisable without any surrender to the use of the tenant's will (*a*): but the devise only gives the devisee a right to be admitted, similar to the right of a surrenderee, and he does not become completely tenant until admittance, a ceremony usually involving the payment of a fine to the lord (*b*). In default of being devised, copyholds in fee descend to the customary heir, that is, to the person entitled by the custom of the manor in which the lands lie, to

(*s*) Stat. 53 & 54 Vict. c. 29; see *Re Twigg's Estate*, 1892, 1 Ch. 579; *Re Charriere*, 1896, 1 Ch. 912; *Re Heath*, 1907, 2 Ch. 270; Wms. Real Prop. 233, 328, 21st ed.

(*t*) See Wms. Real Prop. 110, 21st ed.

(*u*) *Ibid.* 232.

(*x*) *Ibid.* 59, 60.

(*y*) That is, of course, under the provisions of the Wills Act, replacing those of stat. 14 Geo. II.

c. 20, and the Statute of Frauds; see Wms. Real Prop. 132, 133, 21st ed.; *Re Inman*, 1903, 1 Ch. 241.

(*z*) Wms. Real Prop. 495, 496, 21st ed.

(*a*) That is, since stat. 55 Geo. III. c. 192, passed 12th July, 1815; see Wms. Real Prop. 486, 487, 21st ed.

(*b*) See *Garland v. Mead*, L. R. 6 Q. B. 441; Wms. Real Prop. 467, 468, 486, 487, 21st ed.

succeed to them as heir; and he acquires the estate directly on the ancestor's death, though he is not completely tenant as regards the lord until admittance (c). And it appears that, even when copyholds are devised by will, the estate descends to the customary heir, pending the devisee's admittance (d). Copyholds given to the tenant and the heirs of his body in a manor, where there is no custom to entail, being held for an estate similar to a fee simple conditional at common law, are alienable and therefore devisable on the birth of issue: but if not devised, they descend to the customary heirs of the donee's body only (e). Copyholds held to the tenant and the heirs of his body of a manor, where there is a custom to entail, appear not to be devisable by will, if the entail be not duly barred in the tenant's lifetime (f); and unless the entail be so barred, they will descend to the customary heir in tail (g). Copyholds held for an estate *pur autre vie* are devisable; if not devised, they descend to the heir of the grantee, if the estate were given to him and his heirs: otherwise they pass to the executors or administrators and are distributable as personalty (h).

Leaseholds for years were always devisable as chattels. Leaseholds.
As chattels too, they devolved upon the deceased tenant's executors or administrators and were applicable in payment of his debts (i). And the executors or administrators, or any one of them (j), always had the

(c) Wms. Real Prop. 459, 476, 21st ed.

(d) *Garland v. Mead*, L. R. 6 Q. B. 441; but see Davidson's Concise Precedents, 576, n., 18th ed.

(e) 1 Scriv. Cop. 69, 3rd ed.; *Rowden v. Maltster*, Cro. Car. 42; Wms. Real Prop. 471, 21st ed.

(f) See stat. 3 & 4 Will. IV. c. 74, ss. 40, 50. Before this Act, it was held that in manors where entails were barrable by

surrender, they might be barred by a surrender to the use of the tenant's will; *Carr d. Dagwell v. Singer*, 2 Ves. sen. 603; *Moore v. Moore*, ib. 596, 602; 1 Scriv. Cop. 71, 3rd ed.

(g) See Wms. Real Prop. 471-473, 21st ed.

(h) Ibid. 473.

(i) Ibid. 20, 21, 521.

(j) *Simpson v. Gutteridge*, Madd. 609.

same powers of disposition over the deceased person's leaseholds as over his other chattels (*k*); and so might sell or mortgage the same to raise money for payment of funeral or testamentary expenses or debts, or, if necessary, legacies. By such a sale or mortgage the leaseholds are conveyed free from all claims of the deceased person's creditors, legatees or next of kin; and the purchaser or mortgagee is in no way concerned to see to the application of the purchase money, or to inquire for what purpose the sale or mortgage is made (*l*). Leaseholds, if specifically bequeathed, devolve nevertheless upon the executor in the first instance, and do not pass to the specific legatee until the executor has assented to the bequest: but when this assent is given, they vest in the legatee at once, without the necessity of any formal conveyance to him (*m*). Leaseholds are also distributable as other chattels upon intestacy according to the Statutes of Distribution (*n*). There is, however, this difference between leaseholds and other goods:—Personal chattels devolve on death according to the law of the country in which their owner was domiciled, whilst the succession to lands held under a lease for years is determined by the law of the place where they are situate (*o*).

Equitable
estates.

The devolution on death of an equitable estate in land corresponded in general with that of the legal estate, which was the subject of the equity. Thus the succession after death to the estate of a *cestui que trust* under a simple trust or of a mortgagor of freeholds,

(*k*) *Brazier v. Hudson*, 8 Sim. 67.

(*l*) 2 Wms. Exors. 932-943, 946 sq., 7th ed.; *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, 1894, 2 Ch. 101.

(*m*) Wms. Exors. 679, 1372, 7th ed.; Wms. Pers. Prop. 443, 16th ed.; *Re Culverhouse*, 1896,

2 Ch. 251.

(*n*) Wms. Real Prop. 21, 21st ed.; Wms. Pers. Prop. 479 sq., 16th ed.

(*o*) Wms. Pers. Prop. 439-441, 479, 16th ed.; *Freke v. Lord Carberry*, L. R. 16 Eq. 461; *Duncan v. Lawson*, 41 Ch. D. 394; *Pepin v. Bruyère*, 1902, 1 Ch. 24.

copyholds or leaseholds, was governed by the same rules as determined the course of the legal interest therein (*p*). The exception was that under the old law a widow could claim no dower out of her husband's equitable estate (*q*). This exception was removed by the Dower Act in the case of wives married after the 1st of January, 1834 (*r*): but such dower was placed under the control of the husband equally with dower out of legal estates (*s*).

Formerly, when lands were held upon any trust or by way of mortgage, the legal estate therein devolved upon the tenant's death in the same manner as if he were the beneficial owner of them, but subject to the trust or the equity of redemption. Estates in fee simple so held passed therefore to the devisee or heir, according as they were devised or suffered to descend (*t*). In all well-drawn wills a specific devise used to be inserted of all estates held by the testator upon any trust or by way of mortgage; and this devise was usually made to the persons who were appointed executors (*u*). When a will contained no specific devise of estates subject to a trust or mortgage, the question frequently arose, whether such estates passed under a general devise of all the testator's real estate. The rule was, that such estates did pass under a general devise, unless a contrary intention could be collected from the expressions used in the will, or from the objects of the devise (*x*).

Estates held
on trust or
in mortgage.

The old rule as to the devolution of estates held on trust was first invaded by the Vendor and Purchaser

(*p*) Lewin on Trusts, 670, 6th ed.; 1006, 10th ed.; Wms. Real Prop. 184, 191, 490, 552, 21st ed.; *Re Hudson*, 1908, 1 Ch. 655.

(*q*) Wms. Real Prop. 323.

(*r*) Stat. 3 & 4 Will. IV. c. 105, s. 2; Wms. Real Prop. 327, 21st ed.

(*s*) Above, p. 215.

(*t*) Wms. Real Prop. 192, 548, 551, 21st ed.

(*u*) 4 Davidson, Prec. Conv. 9, 58, 4th ed.

(*x*) *Lord Braybrooke v. Inskip*, 8 Ves. 417; 1 Jarm. Wills, 693 sq., 4th ed.; 647 sq., 5th ed.

Act, 1874 (*y*), enacting that upon the death of a bare trustee (*z*), any corporeal or incorporeal hereditament, of which he was seised in fee simple, should vest in his legal personal representative. This enactment was repealed, except as to anything duly done thereunder, by the Land Transfer Act, 1875 (*a*), after having been in force from the 7th of August, 1874, until the 31st of December, 1875. The same Act provided (*a*) that, upon the death of a bare trustee *intestate*, any corporeal or incorporeal hereditament, of which he was seised in fee simple, should vest in his legal personal representative.

Mortgaged
estates.

When real estate held in mortgage passed on the mortgagee's death to his devisee or heir, it was necessary, on any transfer or reconveyance after such death, that his devisee or heir should convey the legal estate in the mortgaged land, and that his legal personal representatives should join in the conveyance to acknowledge the receipt of the money paid and assign or release the mortgage debt (*b*). By the Vendor and Purchaser Act, 1874 (*c*), the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee should have

(*y*) Stat. 37 & 38 Vict. c. 78, s. 5.

(*z*) Different opinions have been expressed by eminent judges as to the meaning of the expression "bare trustee": but the better opinion is that it is not applicable to a trustee under a special trust who has an active duty to perform with regard to the trust property, as in the case of a trustee for sale, but rather denotes a trustee having no other duty than to convey the trust estate at the *cestui que trust's* direction; see *Christie v. Ovington*, 1 Ch. D. 279; *Morgan v. Swansea Urban Authority*, 9 Ch. D. 582;

Re Docwra, 29 Ch. D. 693; *Re Cunningham and Frayling*, 1891, 2 Ch. 567; Wms. Real Prop. 181, 21st ed.

(*a*) Stat. 38 & 39 Vict. c. 87, s. 48, repealed by 44 & 45 Vict. c. 41, s. 30 (2, 3), as to cases of death after the 31st December, 1881.

(*b*) Davidson, Prec. Conv., vol. ii. pt. ii. pp. 793, 796, n., 816, 818, 4th ed.

(*c*) Stat. 37 & 38 Vict. c. 78, s. 4, passed 7th August, 1874, and repealed by 44 & 45 Vict. c. 41, s. 30 (2, 3), as to cases of death after the 31st December, 1881.

been admitted, might, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage were in form an assurance subject to redemption, or an assurance upon trust. But it was held that this enactment did not give the legal personal representative of a mortgagee power to convey the estate upon a transfer of the mortgage (*d*).

So the law continued until the end of the year 1881. On the death after that year of any sole trustee or mortgagee of real estate, the succession is regulated by the 30th section of the Conveyancing Act of 1881 (*e*), providing as follows :—“ Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his legal personal representatives or representative from time to time (*f*), in like manner as if the same were a chattel real vesting in them or him ; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased’s personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him ; and for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts

Devolution of real estate held in trust or mortgage after 1881.

(*d*) *Re Spradbery’s Mortgage*, 14 Ch. D. 514.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 30.

(*f*) These appear to be his general, and not his special, executors ; *Re Parker’s Trusts*, 1894, 1 Ch. 707 ; cf. below, p. 232.

Copyholds.

and powers." This enactment was held to apply to copyholds as well as freeholds (*g*): but the Copyhold Act, 1887 (*h*), now replaced in this respect by the Copyhold Act, 1894 (*i*), provided that it should not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage. As is well known, trustees of copyhold lands are usually admitted tenants thereof, but mortgagees are not (*j*). On the death of a mortgagee of copyholds, who has not been admitted tenant on the rolls, it appears that his estate will still devolve on his executors or administrators.

Liability of
real estate to
deceased
owner's debts.

Before 1898, freeholds in fee were liable to be applied in payment of the tenant's debts after his death either because, in the case of specialty debts, he had bound his heir to their payment, or because he had by will devised his real estate in trust for or charged with payment of his debts, or under Statute 3 & 4 Will. IV. c. 104 making real estate equitable assets for the payment of the deceased owner's debts generally (*k*). Copyholds in fee were liable to their deceased owner's debts either by virtue of an express charge of debts thereon or under the same statute (*l*). Estates tail in freehold or copyhold were not liable to the tenant's debts after his death (excepting certain Crown debts), unless during his lifetime a judgment had affected the lands, or he had been adjudged bankrupt (*m*). Life estates are of course not liable to the tenant's debts after they have determined by his death or otherwise (*n*). Estates *pur autre vie* were subject to the deceased tenant's debts, if devised,

(*g*) *Re Hughes*, W. N. 1884, p. 53; *Hall v. Bromley*, 35 Ch. D. 642.

(*h*) Stat. 50 & 51 Vict. c. 73, s. 46, passed 16th September, 1887; see *Re Mills' Trusts*, 37 Ch. D. 312; 40 Ch. D. 14.

(*i*) Stat. 57 & 58 Vict. c. 46, s. 88.

(*j*) Wms. Real Prop. 565, 21st ed.

(*k*) Ibid. 280—284.

(*l*) Ibid. 474.

(*m*) Ibid. 289, 290, 475.

(*n*) Ibid. 290, 475.

either by virtue of an express charge or under the last-mentioned statute; and if not devised, under the Wills Act, replacing with regard to freeholds the Statute of Frauds in this respect (*o*). And equitable estates were subject to the like liability as estates at law (*p*). When the heir was specially bound to pay his ancestor's debt, the creditor had the remedy of suing the debtor's heir or devisee personally in an action of debt or covenant: but in order to have the debtor's lands applied in payment of debts after his death the creditor was obliged to take proceedings in equity for the administration of the debtor's estate, when a sale or mortgage of the lands would be decreed, if necessary, to raise money to pay the debt (*q*). And the same proceedings were necessary to secure the benefit of an express charge of debts on real estate or of the statute of 3 & 4 Will. IV. c. 104 (*r*). Where the heir was specially bound or the lands were made assets by the statute, the debts were not a specific lien on the lands (*s*); so that if the lands were aliened for valuable consideration by the heir or devisee before any creditors' proceedings were instituted, the creditor could not follow the lands in the hands of the alienee (*t*), who was not bound, even if he had notice of the deceased owner's debts, to see to the application of the purchase money (*u*). And where lands were devised on trust for or charged with payment of debts, the devisee was also enabled to dispose of them, before the institution of any creditors' proceedings, discharged from all liability to the testator's debts; as it was considered that the testator, both in the case of a

(*o*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6; Wms. Real Prop. 132, 133, 473, 474, 21st ed.

(*p*) Ibid. 293.

(*q*) Wms. Real Prop. 284, 21st ed.; Wms. Real Assets, 16.

(*r*) Wms. Real Prop. 284, 21st ed.

(*s*) *Re Moon*, 1907, 2 Ch. 304.

(*t*) *Spackman v. Timbrell*, 8

Sim. 253; *Richardson v. Hutton*, 7 Beav. 112; *Kinderley v. Jervis*, 22 Beav. 1, 22; Sug. V. & P. 655--657; *Price v. Price*, 35 Ch. D. 297; *Re Atkinson*, 1908, 2 Ch. 307; *Worthington & Co., Ltd. v. Abbott*, 1910, 1 Ch. 588, 591, 599.

(*u*) *Jones v. Noyes*, 4 Jur. N. S. 1033.

trust to pay debts and of a charge of debts, had made his devisee a trustee for the payment of his debts, and from the nature of such a trust a purchaser from the devisee was exonerated from the duty of seeing to the application of the purchase money (*v*). And a mortgagee from a devisee or heir, before creditors' proceedings, was in the same position as a purchaser (*x*). But after an order had been made for the general administration of the deceased debtor's estate, in creditor's proceedings duly registered as *lis pendens* (*y*), the heir or devisee could not dispose of the lands descended or devised to him free from the creditors' claim (*z*). Whether he could so dispose of such lands after creditors' proceedings had been instituted and duly registered as a *lis pendens*, but before an order for administration had been made therein, depended on the nature of the proceedings. If they sufficiently indicated an intention to enforce payment of the debts out of the lands descended or devised, and the heir or devisee were made a party thereto, a purchaser or mortgagee from him would be bound thereby; unless the circumstances were such that the purchaser or mortgagee was entitled to suppose that the sale or mortgage was made to raise money to pay the debts, as where the lands were devised charged with debts to one who was also appointed executor (*a*). The case of a trust or power to sell for payment of debts would appear to be similar; although after an order for administration, the trustees must exercise their powers under the direction of the Court (*b*). So an executor, in exercise of his general

(*v*) Sug. V. & P. 658, 660;
Wms. Real Assets. 50, 51, 62.

(*y*) See Wms. Real Prop. 293,
294, 21st ed.

(*x*) *Ball v. Harris*, 4 My. & Cr.
264; *Eland v. Eland*, ib. 420;
British Mutual Investment Co. v.
Smart, L. R. 10 Ch. 567; *Price v.*
Price, 35 Ch. D. 297; *Re Atkinson*,
1908, 2 Ch. 307.

(*z*) See *Price v. Price*, 35 Ch. D.
297.

(*a*) Ibid.; and see *Corser v.*
Cartwright, L. R. 7 H. L. 731.

(*b*) *Lewin on Trusts*, 391, 392,
515, 6th ed.; 515, 733, 734,
10th ed.

power to alien his testator's assets, may well dispose of the testator's leaseholds, notwithstanding that creditors' proceedings are pending, at any time before an order for administration is made (*c*).

Before 1898, the rule was that an executor took no estate or interest by virtue of his office in any of his testator's real estate; any devise of such real estate was entirely independent of the executor's assent or interference (*d*); and, as we have seen (*e*), a will of real estate, as such, did not require probate. We have noticed (*f*) the exceptions created by statute in the case of estates *pur autre vie* undevised, where there was no special occupant, and of estates held on trust or by way of mortgage. But of course a man might expressly devise his lands to his executors on trust for sale or otherwise, or so that his executors should have a power of disposing of his lands; and such devises were commonly made whenever a testator desired that any of his real estate should be sold or applied in payment of his debts. And in certain cases a power for a man's executors to sell his real estate would be implied. Thus if by will lands were directed to be sold, without saying by what persons the sale was to be made, it would be implied that the executors should have the power of selling the lands, if the proceeds of sale would be distributable by the executors, as where the sale was directed to be made for the purpose of paying debts or legacies or the testator had created a mixed fund composed of the proceeds of sale of such lands and of personalty (*g*). And about the middle of the last century it was decided in equity (*h*) that a mere testa-

Executors formerly had no interest in their testator's real estate.

Power for executors to sell real estate might be implied.

(*c*) *Neeves v. Burrage*, 14 Q. B. 504.

(*d*) See 1 Wms. Exors. pt. ii. bk. ii.; Wms. Real Prop. 260, 21st ed.

(*e*) Above, p. 161.

(*f*) Above, pp. 216, 217, 221.

(*g*) Sug. Pow. 118, 8th ed.; 1 Wms. Exors. 655, 7th ed.; Wms. Real Assets, 53-55, 77 sq.

(*h*) The contrary was decided at law; *Doe d. Jones v. Hughes*, 6 Ex. 223.

Statutory
powers.

mentary charge of debts on real estate implied a power for the executors to sell the real estate so charged (*i*). This doctrine met with severe criticism from eminent lawyers (*j*); it was not only thought to be unwarranted by reason or authority, but it threw doubt on the previously received opinion that a devisee of lands charged with debts could so dispose of the same as to exonerate the purchaser from seeing that the testator's debts were paid (*k*). In 1859, statutory provision was made to remove the difficulties then attendant on the sale of lands charged by will with the payment of debts. Lord St. Leonards' Act (*l*) provides (*m*) that where, by any will that shall come into operation after the passing of the Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts or of any legacy, or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, such trustee or trustees may, notwithstanding any trusts actually declared by the testator, raise such debts, legacy or money by sale or mortgage of the lands devised to them. But if any testator, who shall have created such a charge, shall not have devised the hereditaments charged in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in his will (if any) shall have the

(*i*) *Wrigley v. Sykes*, 21 Beav. 337; *Sabin v. Heape*, 27 Beav. 553.

(*j*) Sug. Pow. 120-122; Sug. V. & P. 662, n.; Wms. Real Assets, 81 sq.; Lewin on Trusts, 402 sq., 6th ed.; 526 sq., 10th ed.

(*k*) Above, p. 223.

(*l*) Stat. 22 & 23 Vict. c. 35, passed 13th August, 1859.

(*m*) Sect. 14. The powers thus conferred extend to all persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, and to any persons appointed to succeed to the trusteeship, either under any power in the will, or by the Court; sect. 15.

same power of raising the same moneys as is before vested in the trustees (*n*). And purchasers or mortgagees are not to be bound to inquire whether the powers thus conferred shall have been duly exercised by the persons acting in exercise thereof (*o*). But these provisions are not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the Act; nor are they to extend to a devise to any person in fee or in tail or for the testator's whole estate and interest charged with debts or legacies; nor are they to affect the power of any such devisee to sell or mortgage as he or they may by law now do (*p*). It will be observed that this last enactment does not expressly settle the question whether a devisee of lands charged with debts could dispose of them freed from the charge, according to the old conveyancing opinion (*q*). And in a subsequent case in the House of Lords, where it was held that a devisee of lands charged with debts, who was also an executor, could certainly dispose of the lands freed from the charge, Lord Cairns observed that different considerations might arise where such a devisee was not executor (*r*). Mr. Joshua Williams, however, appears to have had no hesitation in pronouncing for the old conveyancing opinion (*s*) in this case, namely, that the charge of debts enabled the devisee to give a receipt for the purchase-money exonerating the buyer from seeing to its application (*t*). And Mr. Dart approved of this conclusion on principle: although he advised that a prudent purchaser could scarcely disregard Lord Cairns'

(*n*) Sect. 16. Such power shall from time to time devolve to the person or persons (if any) in whom the executorship shall for the time being be vested.

(*o*) Sect. 17.

(*p*) Sect. 18. See *Re Wilson*, 2 Times L. R. 443; 31 W. R. 512.

(*q*) Above, pp. 223, 224.

(*r*) *Cosser v. Cartwright*, L. R. 7 H. L. 731, 737. The decision in this case was followed in *Re Henson*, 1908, 2 Ch. 356.

(*s*) Above, p. 223.

(*t*) Wms. Real Prop. 223, 13th ed.; 261, 21st ed.

dictum, and recommended him, in cases not covered by Lord St. Leonards' Act, either to satisfy himself that the debts were paid, or to procure the executors' authority for payment of the purchase-money to the devisee (*u*). It has been held that, when executors sell real estate charged with debts under the power of sale so given by statute, the purchaser is not bound to inquire whether any debts remain unpaid, until twenty years have elapsed after the testator's death (*x*).

Administra-
tors.

An administrator of an intestate person's effects of course had no interest in his real estate; and an administrator *cum testamento annexo* acquired no interest in any real estate devised to the executors of the will, and could not exercise any power which the testator had either expressly or impliedly (*y*) given to his executors with respect to his real estate (*z*). Nor can an administrator *cum testamento annexo* exercise the powers given to executors by Lord St. Leonards' Act to sell or mortgage the testator's real estate to pay debts or legacies (*a*).

The Land
Transfer Act,
1897.

By the Land Transfer Act, 1897 (*b*), where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death after that year (*c*), notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if

(*u*) 2 Dart, V. & P. 618-621, 5th ed.; 697-700, 6th ed.; 639-642, 7th ed.

(*x*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465. This rule is not applicable in the case of an executor selling leaseholds: and the purchaser is entitled, unless he have actual notice that no debts remain unpaid, to presume that such a sale is rightly made although more than twenty years have elapsed since the tes-

tator's death; *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, 1894, 2 Ch. 101; *Re Verrell's Contract*, 1903, 1 Ch. 65.

(*y*) Above, pp. 225, 226.

(*z*) Y. B. 15 Hen. VII. fos. 11, 12, pl. 22, translated Sug. Pow. 893, 895, 8th ed.

(*a*) *Re Clay and Tetley*, 16 Ch. D. 3; above, p. 226.

(*b*) Stat. 60 & 61 Vict. c. 65, s. 1 (1).

(*c*) Sects. 1 (5), 25.

it were a chattel real vesting in them or him. This enactment applies to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him (*d*). But the expression "real estate" does not here include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*e*). Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (*f*).

Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*g*). All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration, and other matters in relation to the administration of personal estate and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him (*h*), save that it shall not be lawful for some or one only of several joint personal represen-

Personal representative trustee for the heir.

Powers of personal representatives over real estate.

(*d*) Sect. 1 (2).

(*e*) Sect. 1 (4).

(*f*) Sect. 1 (3). Where a person dies possessed of real estate, the Court shall in granting letters of administration, have regard to the rights and interests of persons

interested in his real estate, and his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin; sect. 2 (4).

(*g*) Sect. 2 (1).

(*h*) *Sic*.

Liability of
real estate to
deceased
owner's debts.

tatives, without the authority of the Court, to sell or transfer real estate (*i*). In the administration of the assets of a person dying after the year 1897, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing in the Act contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies (*k*).

Personal
representa-
tives' assent
to devise of
real estate.

At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance (*l*). And at any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or in the case of registered land, that the person so entitled be registered as proprietor of

(*i*) Sect. 2 (2).

(*k*) Sect. 2 (3).

(*l*) Sect. 3 (1).

the land either solely or jointly with the personal representatives (*m*).

It is not the writer's purpose to make an exhaustive comment on this Act: but its most important results may be indicated. The first of these is to assimilate the devolution of the legal estate in freehold lands held in fee to that of a chattel real (*n*), and to subject such lands to the same liability to their deceased owner's funeral and testamentary or administration expenses and debts as his chattels incurred at common law, though without interfering with the order in which the assets are applicable in payment of such expenses and debts (*o*).

Effect of the Act.

(*m*) Sect. 3 (2).

(*n*) There is this distinction, however:—Pending the appointment of an administrator, the chattels of a person dying intestate vested formerly in the ordinary, and afterwards in the judge of the Court of Probate and now appear to vest in the judges of the High Court of Justice who have succeeded to the jurisdiction of the judges of the Probate Court; Stats. 21 & 22 Vict. c. 95, s. 19; 36 & 37 Vict. c. 66, ss. 11, 12, 16, 31, 34; *Pinner v. Hunt*, 6 Ch. D. 98; *Wms. Pers. Prop.* 475, 16th ed.: but the freehold estates in fee simple of a person dying intestate appear still to vest in the heir pending the appointment of an administrator. In *John v. John*, 1898, 2 Ch. 573, 576, North, J., held that since the commencement of the Land Transfer Act, 1897, real estate devised to a man's executors descends to the heir pending probate of the will. But this appears to have been an oversight. Where executors are appointed, they derive their authority and right to represent

the testator from the will, not from the Court in which the will is proved. And the Act provides that real estate shall vest in the legal personal representatives in the same manner as chattels real vest in them, and applies to real estate the law with respect to dealing with chattels real before probate. Chattels real vest in the executors appointed by their owner's will immediately on his death; and the executors can dispose of them before probate; *Graysbrook v. Fox*, Plowd. 275, 281; *Hensloe's Case*, 9 Rep. 38a; *Woolley v. Clark*, 5 B. & A. 744; *Brazier v. Hudson*, 8 Sim. 67. And it has since been decided that the law is now the same with regard to real estate; *Re Pawley and London and Provincial Bank*, 1900, 1 Ch. 58. But were this not so, it does not appear that real estate devised would descend to the heir pending probate. When an administrator has been appointed, his title to the real estate relates back to the intestate's death; *Re Pryse*, 1904, P. 301, 305.

(*o*) See *Re Jones*, 1902, 1 Ch. 92; *Re Vickerstaff*, 1906, 1 Ch. 762; *Re Betts*, 1907, 2 Ch. 149. The order is as follows:—

1. The general personal estate not expressly or impliedly exempted.
2. Lands expressly devised to pay debts, whether the inheritance or a term carved out of it, be so limited.

Then the personal representatives are invested with the same powers of disposition over such lands as they have at common law with respect to chattels real (*p*); but with the important distinction that such powers are not exercisable by some or one only of several joint personal representatives without the authority of the Court. And it has been decided that, where a testator appoints several executors, his real estate vests in all of them immediately on his death; so that if any one of them do not prove the will and do not renounce probate, the others cannot dispose of the real estate without his concurrence (*q*). Where, however, the testator appoints general executors and also special executors (as of his assets in a colony or foreign country) his real estate in England vests in his general executors only, who can sell and convey the same without the concurrence of

3. Estates which descend to the heir, whether acquired before or after the making of the will; see *Re Pullen*, 1910, 1 Ch. 564.
4. Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts, and disposed of, subject to such charge; *Re Salt*, 1895, 2 Ch. 203; *Re Roberts*, 1902, 2 Ch. 834; *Re Kempster*, 1906, 1 Ch. 446; *Re Balls*, 1909, 1 Ch. 791, 794.
5. General pecuniary legacies.
6. Specific legacies and real estate devised, whether in terms specific or residuary, *pro rata*.
7. Real and personal property over which the testator had a general power of appointment, and which he has appointed, either by his will or by deed, in favour of a volunteer.

See 2 Jarm. Wills, 622, 4th ed.; Wms. Real Prop. 282-285, 21st ed. The Act does not give to an executor or administrator any right of retainer out of real estate; *Re Williams*, 1904, 1 Ch. 52.

(*p*) See above, pp. 217, 218, 228, n. (*x*).

(*q*) *Re Parley and London and Provincial Bank*, 1900, 1 Ch. 58. Renunciation of probate by one appointed executor is equivalent to a disclaimer of any interest conferred on him by the appointment in the testator's estate, real or personal; see *Long v. Symes*, 3 Hagg. 771, 774, 778; *Re Birchall*, 40 Ch. D. 436, 439; *Re Fisher and Haslett*, 13 L. R. Ir. 546. As a rule, a trust estate

may be disclaimed by deed or conduct, as well as by matter of record; *Re Birchall*, *ubi sup.* But it should be noted that an executor cannot renounce probate by matter in pais; 1 Wms. Exors. 281, 7th ed. Since, therefore, an executor, who has not proved, cannot disclaim the office by deed or conduct, it appears that he cannot so disclaim the estate in the testator's realty vested in him as incident to that office.

the special executors (*r*). The Act makes it equally necessary for executors to assent to a devise of land, whether specific or residuary (*s*), as to a specific bequest of personalty. And the executors' assent is sufficient to vest in the devisee the legal estate in the devised lands, without any formal conveyance, as in the case of assent to the specific bequest of a chattel real (*t*). But where lands are not devised but suffered to descend, the legal personal representatives must convey the same to the heir (*u*). Having regard to the provisions of the Act with regard to the powers of several executors to sell or *transfer* real estate and the right of the heir or devisee to require a *transfer* of the same (*v*), and the above-mentioned decision (*w*), the question is raised whether all those appointed executors (save such as have renounced probate) must not join in assenting to a specific devise (*x*). It seems clear that they must all join in a conveyance of the real estate to the devisee or heir. Where the personal representatives convey the real estate to the heir or devisee, subject to a charge for the payment of any money which they are liable to pay (*y*), and have previously issued the usual statutory advertisements for creditors, the charge does not extend to debts of which they had no notice at the time of conveyance (*z*).

(*r*) *Re Cohen's Executors and London County Council*, 1902, 1 Ch. 187.

(*s*) The law regards every devise of lands as being in effect specific, though in terms it may be residuary; *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, L. R. 10 Ch. 136; 2 Jarm. Wills, 1431, n., 5th ed.

(*t*) *Re Pix*, 1901, W. N. 165; *Kemp v. Inland Revenue Commrs.*, 1905, 1 K. B. 591, deciding that no stamp is necessary where the assent is given in writing not under seal; above, p. 218.

(*u*) See sect. 3 (1), above, p. 230.

(*v*) Above, p. 229.

(*w*) Above, p. 232, n. (*q*).

(*x*) In the case of a chattel, real or personal, assent may be either express or implied, and the assent of one of several executors is sufficient, even though he be himself the legatee; *Tournson v. Tickell*, 3 B. & A. 31, 40; *Cole v. Miles*, 10 Hare, 179; 2 Wms. Exors. 948, 1374-1378, 7th ed. In the absence of any decision, it cannot safely be assumed that this is now the law with regard to realty.

(*y*) See above, p. 230.

(*z*) *Re Cary and Lutt's Contract*, 1901, 2 Ch. 463. See Wms. Pers. Prop. 458, 16th ed.

The devolution of the beneficial interest in lands is not altered by the Act. Such interest may therefore be devised to the same extent as before, remains subject to the law of dower and curtesy, and upon intestacy descends to the heir or escheats according to the law previously in force (*a*). It is obvious that the term *real estate* (*b*) as used in the Act must receive a restricted interpretation. Life estates are real estate: but as they cease on death, of course they do not pass to the personal representatives, nor are they made liable to the deceased owners' debts. It is submitted that the key to the construction of the Act is in the provision that real estate shall vest in the personal representatives, *notwithstanding any testamentary disposition* (*c*). This seems to show that the Act is intended to apply to such real estate as may be effectually devised by will. If this be so, the descent of estates tail, whether legal or equitable, remains unaffected by the Act. But pending the decision of the Court on this point, a real difficulty is raised by the unskilled wording of the Act in the case of estates tail. They are not only real estate, but real estate of inheritance in the hands of the donee; as such, they are subject to the law of dower and curtesy (*d*); and they are charged by statute, in the hands of the heir in tail after his ancestor's death, with debts due from the ancestor to the Crown by judgment, recognizance, obligation or other specialty, although the heir shall not have been comprised therein (*e*), and also with all arrears and debts, if any, due to the Crown from the ancestor as an accountant to the Crown whose yearly or total receipts exceeded three hundred pounds (*f*). Why

Estates tail.

(*a*) Above, pp. 213—216.

(*b*) As to the origin and meaning of the term "real estate," see Wms. Real Prop. 8, 25-29, 184, 548, 21st ed.

(*c*) Sect. 1 (1); above, p. 228.

(*d*) Above, pp. 214, 215.

(*e*) Stat. 33 Hen. VIII. c. 39, s. 52 (s. 75 in Ruffhead); Chitty on the Prerogative of the Crown, 299.

(*f*) Stat. 13 Eliz. c. 4; see 25 Geo. III. c. 35; Chitty, Prerogative, 294, 295.

then, it may be urged, shall not estates tail vest in the deceased owner's personal representatives and be charged with the payment of all his debts, according to the letter of the Land Transfer Act? It is probable, however, that the Court will consider that no sufficient intention is expressed in the Act to subject estates tail to all their deceased owner's debts, and that the Act only applies to devisable real estate. But the point is one on which it would be scarcely safe to act upon a text-writer's opinion. The Act seems to apply to all real estate, to which the deceased person was entitled for his own benefit in equity, and which he might devise by his will (*g*). As regards copyholds, it is clear that legal estates of inheritance in copyholds vested in one, who has been duly admitted tenant on the rolls for his own benefit, are left to pass to the devisee or heir according to the previous law (*h*). But it has been decided that an equitable estate in fee in copyholds passes to the legal personal representatives under the Act (*i*); and the opinion has been judicially expressed that the provisions of the Land Transfer Act, 1897, excepting copyholds and customary freeholds from being included in "real estate" in cases where an admission or any act by the lord is necessary to perfect the title of a purchaser from *the customary tenant* (*k*), are to be construed as referring to a purchaser from the copyholder or other customary tenant, who is the actual tenant on the rolls or at law of the lord. Upon this construction of the Act, it appears that the equitable estate in fee of an unadmitted surrenderee of copyholds (*l*) passes on his death to his personal representatives.

Equitable estates.

Copyholds.

Equitable estate in copyholds.

Equitable estate of unadmitted surrenderee.

(*g*) Kekewich, J., *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583, 587, 588.

(*h*) Above, pp. 216, 217.

(*i*) *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583.

(*k*) Above, p. 229.

(*l*) See 1 *Serv. Cop.* 172, 173, 262, 361, 3rd ed.; 1 *Wat. Cop.* 118 and n. (1), 4th ed.; Elton on *Copyholds*, 70.

Real estate
escheating to
the Crown.

It has been held that the Crown is not bound by the Land Transfer Act, 1897, and therefore the legal estate in lands escheating to the Crown does not vest in the solicitor to the Treasury, who takes out administration as nominee of the Crown, where chattels fall to the Crown upon intestacy (*m*). But it does not appear that this decision governs the case of an escheat to a common person. Lands liable to escheat are devisable (*n*), and are also assets for payment of the deceased tenant's debts (*o*). These are reasons for holding that lands liable to escheat to a mesne lord will vest under the above-mentioned Act in the executors of any will the tenant may have made, though relating to personal estate only, or in his administrator, if he die wholly intestate. It seems that a purchaser of real estate from an executor or administrator professing to sell under this Act should require to be satisfied that the property sold does not escheat to the Crown, *i.e.*, that there is an heir or a devisee.

(*m*) *In the Goods of Hartley*, 1899, P. 40.

(*n*) See Wms. Real Prop. 56, 21st ed.

(*o*) *Evans v. Brown*, 5 Beav. 114; *Hughes v. Wells*, 9 Hare, 749; *Beale v. Symonds*, 16 Beav. 406.

CHAPTER VIII.

OF NOTICE OF TRUSTS AND SALES BY TRUSTEES.

§ 1. Of Notice of Trusts.

§ 2. Of Sales by Trustees.

IN order to call attention to every point which may possibly come before a conveyancer for his consideration in advising on title, it would be necessary to give an exhaustive account of the whole of the English law of real property and chattels real. To this the present work makes no pretension, the writer's chief aim being to set forth the main principles of the law relating to sales of land. There are, however, various points arising on particular titles which are of sufficiently frequent occurrence to call for special mention; and it is now proposed to deal with these. We will begin in the present chapter with the subject of notice of trusts and sales by trustees. Next, we will treat of titles depending on the exercise of a power, especially the power of sale given by the Settled Land Acts; and then we will shortly consider a variety of miscellaneous matters such as sales of copyholds, of leaseholds, of lands situate in Middlesex or Yorkshire, and other special subjects.

§ 1.—*Of Notice of Trusts.*

We have seen (a), that whenever the purchaser's adviser obtains notice from any document or fact Notice
of trust.

(a) Above, p. 170.

appearing on the abstract or produced or elicited in the course of investigation of the title that a person entitled to some legal estate or interest in the property sold holds the same upon some trust (*b*) or subject to some equity, he must see that title is properly deduced through or from all persons beneficially entitled under the trust or equity, unless the circumstances be such that a good title can be made without the concurrence of the beneficiaries, as in the case of a trust for or power of sale. When lands are vested in trustees, it is frequently desired to keep notice of the trusts off the title. This is especially the case when mortgages are made to trustees; and it has been the regular practice, whenever a mortgage is held by trustees, to represent in the mortgage deed that they are jointly entitled in equity as well as at law (*c*); and also, when such a mortgage has had to be transferred to give effect to an appointment of new trustees, to frame recitals in the deed of transfer which shall not disclose the trust. Thus, if John and Thomas are trustees who have invested part of their trust money on mortgage, and Thomas wishes to retire from the trust, Charles being appointed in his place, Charles is duly appointed a trustee in the usual way, and then a separate deed is executed between the three whereby, after a recital that the principal money and interest now owing upon the security have become and are the property in equity of John and Charles, John and Thomas assign the mortgage debt and convey the mortgaged lands to John and Charles (*d*). It has

(*b*) Note that notice that the legal owner holds in trust is sufficient to put the purchaser upon inquiry, although the name of the *cestui que trust* or the purposes of the trust be not disclosed by the notice; *Bank of Montreal v. Sweeney*, 12 App. Cas. 617, 621, 622; *Perham v. Kempster*, 1907, 1 Ch. 373, 380.

(*c*) This was done, before 1882, by the joint-account clause then usual, and has since been usually accomplished by the operation of sect. 61 of the Conveyancing Act of 1881; Wms. Real Prop. 569, 21st ed.

(*d*) See Davidson, *Free. Conv.* vol. ii. pt. ii. pp. 51-53, 805, 806, 4th ed.; 2 Key & Elph. *Proc.*

been held that, when recitals of this kind are met with, they may and indeed shall be accepted by a purchaser without inquiry (*e*). Conveyancers therefore, though of course they are well aware for what purpose such statements are made, do not seek to go behind them, and abstain from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust. The acceptance of such statements seems to rest on the presumption that all things have been rightly done (*f*). Thus, if A. and B., who have been parties to deeds which have conferred on them an absolute title at law to some land or mortgage money, choose to acknowledge that the land or money belongs in equity to C. absolutely, a purchaser from them is justified in accepting this acknowledgment as rightly made, and in assuming, without further evidence, that the whole beneficial title is, as stated, in C. And he is not bound to make and should refrain from making any further inquiry in the matter, such as whether the trust admitted by A. and B. in C.'s favour is declared by any document. He is, it is conceived, justified in

Conv. 242, 243, 4th ed. ; 224, 225, 8th ed. Where a deed of this kind is abstracted as part of a vendor's title, the purchaser's advisers must of course see that it is duly stamped. Such a transfer, if made between beneficiaries, requires an *ad valorem* stamp ; but as a transfer made for effectuating the appointment of a new trustee it would not require a higher stamp than 10s. ; see stat. 51 & 55 Vict. c. 39, s. 62, and First Schedule, tit. Mortgage ; 10 Edw. VII. c. 8, s. 74 (6) ; Davidson, *Proc. Conv.* vol. iv. pp. 609, 610, 3rd ed. If the mortgage money should exceed 2,000*l.* and the stamp be 10s. only, the vendor should be required to have the deed duly stamped with the proper *ad valorem* stamp. If in such case the deed be stamped

with an *adjudication* stamp of 10s. the purchaser cannot require it to be further stamped : see stat. 54 & 55 Vict. c. 39, s. 12 (5, 6 a) ; and it is thought that he is not thereby affected with notice of any trust.

Re Harman and Uchridge, 42 *Ch. D.* 720, a very strong instance, as the recital which the Court compelled the purchaser to accept was not made by one who otherwise appeared to be absolutely entitled, but was a recital by an executrix, to whom her testator's estate had been given on trust for others, that *her testator* held the property in question as trustee for other persons, who were jointly entitled thereto.

(*f*) *Ante*, p. 118 ; *Re Cousins*, 31 *Ch. D.* 671, 675.

such circumstances in accepting a conveyance of the land or a transfer of the mortgage from A. and B., with the concurrence of C., without making any further investigation of C.'s title or as to the nature of the alleged trust. Where the legal title is correct on the face of the abstract, the purchaser is not entitled to object to it on the *mere suspicion* of some equity adverse to the title (*g*). It is, of course, quite a different matter if some document be disclosed to the purchaser, showing that A. and B. are trustees of the land or money on certain particular trusts, as for C. for his life and after his death for his children. In that case the purchaser has notice of the trusts declared by the document, and must have regard to them; he is no longer entitled or bound to accept as correct any statement by A. and B. that they are jointly entitled in equity as well as at law or are trustees for C. On the contrary, the purchaser is entitled to require and should ask for all such information respecting matters connected with the trusts so disclosed as he could have demanded if no such statement had been made (*h*). For example, where a mortgage has been made to several persons jointly, and it is disclosed to a purchaser that they hold upon the trusts declared by a particular deed of settlement, it should be ascertained that these persons are or were the duly appointed trustees of the settlement and were empowered to invest their trust funds on mortgage and can give receipts for the mortgage money when repaid (*i*). And where land has been conveyed to several persons jointly in fee, and it is disclosed that they are trustees of some settlement, a purchaser from them must find out whether they are duly appointed trustees and were empowered to invest their trust funds in the purchase of land and

(*g*) *McQueen v. Farquhar*, 11 Ves. 467; *Green v. Pulsford*, 2 Beav. 70; below, Chap. XIX. § 3.

(*h*) *Re Blalberg and Abrahams*, 1899, 2 Ch. 340.

(*i*) See *S. C.*

are empowered to sell the land and can give good receipts for the purchase money; and if it appear that such powers have not been conferred upon them, he must require the concurrence of all persons beneficially entitled, and should not accept the title if this cannot be obtained or some beneficiary be under an insurmountable disability.

Where lands have been assured to several persons as joint tenants without disclosing the fact that they are trustees, circumstances may occur which will place the conveyancer engaged in investigating the title on behalf of a purchaser in an awkward dilemma. Thus, if it appear on the face of the abstract that several persons were seised of lands in fee (not by way of mortgage), and one of them has died, the purchaser may of course require the usual proof of the discharge of the succession and estate duty which would be payable on the death if they were beneficially entitled (*k*). But if this be done, and the joint tenants were in fact trustees, the only answer that can be given will be that no duty became payable, because the deceased person was not beneficially entitled (*l*). This, however, is tantamount to notice that he was a trustee; and after such an answer the purchaser cannot safely accept the title without the concurrence of the persons beneficially interested (*m*). On the other hand, if no requisition as to succession or estate duty should be made, and the joint tenants should happen not to be trustees, and the duty had not been satisfied, the purchaser would take the property subject to the charge of duty (*n*). And the same difficulty may arise, as regards estate duty,

Circumstances may make disclosure of a trust unavoidable.

(*k*) See Stats. 16 & 17 Vict. c. 51, s. 3; 57 & 58 Vict. c. 30, ss. 1, 2 (1).

(*l*) See Stats. 16 & 17 Vict. c. 51, s. 2; 57 & 58 Vict. c. 30, s. 2 (3).

(*m*) See 2 Dart. V. & P. 594, 5th ed.; 669, 6th ed.; 1230, 7th ed.; above, p. 238, n. *b*.

(*n*) See Stats. 16 & 17 Vict. c. 51, s. 42; 57 & 58 Vict. c. 30, s. 9 (1).

in consequence of the death of one of several joint mortgagees : although with respect to succession duty the law is different. Thus, in such a case succession duty would be payable, if the mortgagees were beneficially entitled, by the survivors as on a succession to personal property ; but the duty would not be a charge on the successors' interest, except while the property should remain in their ownership or control ; and it does not appear that persons in whom the property (that is, the mortgage debt and the charge on the mortgaged lands) might become vested by alienation *after* the succession had become an interest in possession would be accountable for the duty (*o*). It appears, therefore, to be unnecessary for any person proposing to take from the survivors a transfer or release of the mortgage to inquire respecting the payment of such succession duty (*p*). But in the case of the estate duty which would be payable if the mortgagees were beneficially entitled, it is at least a question whether persons in whom the mortgage should become vested by the alienation of the surviving mortgagees would not be accountable for the duty, and whether the property (which would not have passed to the deceased person's executor) would not be charged therewith (*q*). And if a person taking a transfer from such surviving mortgagees would be so accountable, or the duty be a charge on the mortgage debt, it seems that he ought to ascertain whether the duty has been discharged before he pays them the money owing on the security ; and it is easy to put a case in which omission to make this inquiry might lead

(*o*) See Stat. 16 & 17 Vict. c. 51, ss. 42, 44.

(*p*) Davidson, *Prec. Conv.* vol. ii. pt. ii. pp. 52, 53, 4th ed. ; but see 2 Dart, V. & P. 594, 5th ed. ; 669, 6th ed. ; 1230, 7th ed.

(*q*) See Stat. 57 & 58 Vict. c. 30, ss. 8 (4), 9 (1). It may be doubted whether sect. 8 (4), ac-

cording to the strict grammatical construction of the words used, makes a person accountable in whom the property *shall become* vested by alienation made after the death, which gives rise to the liability to duty : but in Hanson's *Death Duties*, 174, 4th ed. (197, 5th ed.), it is asserted that it does.

to a serious liability. Thus, suppose that a father and a son were joint mortgagees, who had made the investment with the view of the survivor becoming solely entitled, and the father died first: could any person safely take a transfer of the mortgage from the son without inquiring as to the payment of the estate duty? For if in this case the duty be indeed a charge on the property which passed on the father's death, then the mortgage debt and the mortgagee's estate in the mortgaged lands would appear to be as effectually charged therewith as if the two mortgagees had made a sub-mortgage of which the debtor had notice. And a similar difficulty arises where it is proposed to take a release or reconveyance by the survivor of two joint mortgagees appearing to be beneficially entitled. For if the estate duty which became payable on the death of one of the mortgagees be a charge on the *property* (that is, the mortgage debt and the mortgagees' estate in the lands), and the mortgagor or his successors in title have notice of the charge of duty, it does not appear that a release or reconveyance to him or them by the surviving mortgagee alone would vest in them the mortgagee's interest free from the charge of duty (if unpaid); and it seems that he or they might be held to be accountable for the duty as being a person or persons in whom the property had become vested by alienation (*r*). There seems to be no doubt that where a title is deduced through joint tenants appearing on

(*r*) See Stat. 57 & 58 Vict. c. 30, s. 8 (4); above, p. 242, n. (g). Where lands have been mortgaged to two persons jointly, the mortgagor and his successors in title are not accountable under the same sub-section, as being "trustees or other persons in whom any interest in the property is vested," for any estate

duty which may have become payable on the death of one of the mortgagees; they are in the position of debtors; see *Matthew v. Northern Assurance Co.*, 9 Ch. D. 80. But if a debtor have notice of a charge created on the debt due from him, how can he safely pay the whole amount of the debt to the original creditor?

the face of the deeds to be entitled for their own benefit, the only course which is perfectly safe is to treat them as being so entitled for all purposes, and consequently to require proof of the discharge of all death duties which if they were so entitled would be a charge on the property in the purchaser's hands. At the same time the writer believes that hitherto it has not been the practice to inquire respecting the payment of estate duty on the death of one of several joint mortgagees, unless there is good reason (as there would be in the case above put of a joint investment by father and son) to suppose that the parties are not or may not be trustees. The only justification for this course seems to be that joint mortgagees are so generally trustees that the risk run in omitting the inquiry is really very small, and the inconvenience consequent upon asking is exceedingly great. Whenever it is proposed to sell land under a title comprising a conveyance by the survivor of joint mortgagees, and the deceased mortgagee died after the 1st of August, 1894 (*s*), it is advisable to make a special stipulation in the conditions or contract of sale that no inquiry shall be made or objection taken as to any estate duty that may have become payable on such death (*t*). Where several persons appear to have been entitled to lands as joint tenants, but not by way of mortgage, it has not been the practice to refrain from inquiry as to the discharge of any death duties which may have become payable on the death of one of them on the ground that they are likely to have been trustees : on the contrary, regard is had to the fact that omission to inquire as to the payment of estate or succession duty on the death of one of them would leave the purchaser with an unsatisfied charge on the face of his title,

(*s*) The date of the commencement of that part of the Finance Act, 1894, which imposes estate

duty ; Stat. 57 & 58 Vict. c. 30, s. 24.

(*t*) For a form of such a condition, see Appendix A., below.

and so prevent him from getting a good marketable title (*u*).

It is said, speaking generally, that notice of any document is notice of its contents: but this statement is only applicable as a rule subject to the following qualifications:—If a purchaser of any land have notice of some document, which must necessarily affect, or is stated to affect, the title to the land, then he ought to inquire as to its contents; and if he omit to prosecute this inquiry, he will be affected with notice of its contents and of any equitable interest disclosed by its contents. And if the document must necessarily affect the title, he will have notice of its contents (if he have notice of the document), notwithstanding that he were told that the document did not affect the title. But if the document be such as may or may not affect the title, and the purchaser ask, on receiving notice thereof, whether it does affect the title, and be told that it does not, he is justified, in the absence of any reason for suspecting the vendor's veracity or good faith, in accepting this statement as correct; and if he omit to peruse the document, he will not be fixed with notice of its contents or of any equity thereby disclosed (*x*). As

Notice of a document, how far notice of its contents.

(*u*) Theoretically, omission to make the like inquiry with respect to estate duty payable on the death of a joint mortgagee leaves the title equally open to objection: but, as we have seen (above, pp. 241, 242), before the Finance Act, 1894, when succession duty only was payable, there was no necessity to make the inquiry, and the difference arising under that Act with respect to estate duty has hardly yet been appreciated by the profession generally. It should not be forgotten that joint mortgagees, who have been obliged to foreclose, or who have had to take possession and have acquired a title barring the equity

of redemption under the Statute of Limitations, have become owners of the whole estate in the lands and not merely of a charge thereon; and on the subsequent death of one of them any succession duty which might become payable would be a charge on the survivors' estate in the lands, so that inquiry as to the payment thereof could no longer be safely dispensed with; see *Re Loveridge*, 1904, 1 Ch. 518.

(*x*) *Jones v. Smith*, 1 Ph. 244, 253, 254; *Putman v. Harland*, 17 Ch. D. 353, 356, 357; *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221, 230; *English and Scottish Mercantile Investment Co. v. Brun-*

already pointed out (*y*), however, it is imprudent not to require the production of a document, of which the purchaser has notice and which may or may not affect the title, because the document may disclose some *legal* estate or interest adverse to the vendor's title, and the purchaser would take subject to this, whether he had notice of the contents of the document or not.

Notice, actual
or construc-
tive.

Notice of trusts, equities or similar matters, may be either actual or constructive. Actual notice to the person principally concerned himself, as to a purchaser personally, calls for no remark; but it may be observed that the term "constructive notice" is applied to two kinds of notice, namely, the notice which is imputed to a person principally concerned where he acts through a solicitor or other agent, and the notice which is imputed to a person where he or his agent has not made such inquiry or investigation as ought to have been made. The law with respect to notice is now contained in the following section of the Conveyancing Act, 1882 (*z*):—

Restriction on
constructive
notice.

Sect. 3, sub-sect. 1.—A purchaser (*a*) shall not be prejudicially affected by notice of any instrument, fact or thing, unless—

- (i) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or
- (ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Sub-sect. 2.—This section shall not exempt a purchaser from any

ton, 1892, 2 Q. B. 1, 700; *Re Valletort, &c. Co., Ltd.*, 1903, 2 Ch. 654.

(*y*) Above, p. 135.

(*z*) Stat. 45 & 46 Vict. c. 39, s. 3.

(*a*) By sect. 1 (2) (ii) in this Act, "purchaser" includes a lessee or

mortgagee, or an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and "purchase" has a meaning corresponding with that of "purchaser."

liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

Sub-sect. 3.—A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

Sub-sect. 4.—This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act (*b*), the rights of the parties shall not be affected by this section.

Sub-sect. 1 (i) of the above enactment appears to be no more than a statement of the previously existing law (*c*). But sub-sect. 1 (ii) of the above section has made a substantial alteration of the law. Before this Act came into operation, it was necessary, as a general rule, in order that a purchaser might be affected by notice to his counsel, solicitor, or other agent, that the agent should be affected with notice in the same transaction in which the question of notice to the principal arose (*d*). But where one transaction was closely followed by and connected with another, or where it was clear that a previous transaction was present to the mind of the agent when engaged in another transaction, the principal was affected by notice to the agent, although received in the previous transaction (*e*). This exception to the general rule has been removed by the above section. Thus, where A. first mortgaged his share under the trusts of a will to B., who was his solicitor and was also the solicitor of the trustees of the will, and this mortgage was afterwards transferred to C. and then to D., B. acting as C.'s and D.'s solicitor; and

(*b*) Immediately after the 31st Dec. 1882; sect. 1 (2).

(*c*) *Bailey v. Barnes*, 1891, 1 Ch. 25, 35; *Berwick & Co. v. Price*, 1905, 1 Ch. 632, 639; see *Jones v. Smith*, 1 Harv. 43, 1 Ph. 244; *Wilson v. Hart*, L. R. 1 Ch. 463; *Carter v. Williams*, L. R. 9 Eq. 678; *Ratcliffe v. Barnard*, L. R.

6 Ch. 652; *Agra Bank v. Barry*, L. R. 7 H. L. 135; *Putman v. Harland*, 17 Ch. D. 353; *Kettlewell v. Watson*, 21 Ch. D. 685.

(*d*) Sug. V. & P. 757.

(*e*) *Hargreaves v. Rothwell*, 1 Keen. 154, 159; Sug. V. & P. 757; see the cases stated below, pp. 250—253.

within a year after the transfer to D., A. mortgaged the same property to E., when B. acted as A.'s and E.'s solicitor; and E. was the first to give actual notice of his charge to the trustees, who had no personal knowledge of the previous mortgage: it was held that E. was not affected with notice of the previous mortgage by reason of B. having acted as his solicitor, and E.'s charge had accordingly priority over D.'s (*f*).

Reason for the rule that notice to the agent is notice to the principal.

The rule that a purchaser is affected by notice to his counsel, solicitor or other agent (*g*), seems to rest on this ground:—When a man employs such agents to transact his business he holds them out to the world as standing in his own place and representing himself, in fact, as being identical, for the purposes of the business which he has authorised them to transact, with his own person. He must therefore accept this representation of himself by another, which is the consequence of his own act in employing an agent, as complete for *all* the purposes of such business, and cannot justly be permitted to sever the identity of person created by him so as to repudiate notice or knowledge given to or acquired by the agent, but not in fact communicated to the principal (*h*). It is therefore said that, when the relation of principal and agent and the duty of the agent to communicate any matter to the principal have been established, an irrebuttable presumption arises that the agent communicated the matter to the principal—evidence is not admissible to prove that the agent did not in fact communicate his knowledge to the principal (*i*). The rule is, however, subject to the exception that, if the matter, of which it

The exception in case of fraud.

(*f*) *Re Cousins*, 31 Ch. D. 671; and see below, p. 252; *Re Valletort, &c. Co., Ltd.*, 1903, 2 Ch. 654, 663.

(*g*) Sug. V. & P. 756.

(*h*) See *Kennedy v. Green*, 3 My. & K. 699, 719; *Boursot v. Savage*,

L. R. 2 Eq. 134; cf. *Blackburn v. Vigors*, 17 Q. B. D. 553, 12 App. Cas. 531; *Blackburn v. Haslam*, 21 Q. B. D. 144.

(*i*) Fry, J., *Kettlewell v. Watson*, 21 Ch. D. 685, 704-707; *Berwick & Co. v. Price*, 1905, 1 Ch. 632, 639, 640.

is sought to affect the principal with notice, be the agent's own fraud or fraudulent dealing or some equity arising thereout (*k*), or if the agent during the time of his employment as such, and when he acquired the information in question, was a party to a scheme of fraud (*l*), then the principal is permitted to give evidence to rebut the above presumption and to prove his ignorance of the matter; for the supposition that the agent communicated his own fraud to the principal is too improbable to be entertained even by a Court of Equity.

Some very fine distinctions were taken with regard to the above rule and its exception, before the passing of the Conveyancing Act, 1882 (*m*). Thus it was decided that, where a solicitor has been or is acting fraudulently, but the circumstances are such that if the purchaser were represented by another solicitor innocent of the fraud, that solicitor would be put upon inquiry and so affected with notice of some equity other than that arising out of the fraud, the client will be affected with notice of this equity, notwithstanding the solicitor's fraud (*n*). And it was even held, that where in the same transaction a solicitor is engaged in committing a fraud, but has notice of some equity independent of that arising out of his fraud—as where he is a trustee engaged in wrongfully disposing of the trust property for his own benefit—any person who is his client in that transaction will be affected with notice of such independent equity, notwithstanding that, if the client were represented by another solicitor, that solicitor would not be put upon inquiry (*o*). And it was considered

The law previous to the Conveyancing Act, 1882.

k) *Kennedy v. Green*, 3 My. & K. 699, 720; *Cave v. Cave*, 15 Ch. D. 639, 645; *Boswick & Co. v. Price*, 1905, 1 Ch. 632-640.

l) *Shawpe v. Fay*, L. R. 4 Ch. 35; *Re Southampton's Estate*, 16 Ch. D. 178, 184; Fry, J., *Kettle-*

well v. Watson, 21 Ch. D. 685, 707.

(*m*) Above, p. 246.

n) See *Kennedy v. Green*, 3 My. & K. 699.

o) See *Boursot v. Savage*, L. R. 2 Eq. 134.

*Kennedy v.
Green.*

*Boursot v.
Savage.*

that, where the matter of which notice is sought to be imputed is not the solicitor's own fraud or unjust dealing, the mere fact that it was fraudulent or wrongful of the solicitor to conceal the matter from the client is not sufficient to exempt the client from the consequences of the rule (*p*). For example, where a solicitor fraudulently induced a client, who was a mortgagee of leaseholds, to execute (without receiving any money) a deed conveying the legal estate to him as upon a transfer of the mortgage, and having subsequently acquired the equity of redemption mortgaged the whole property to another, for whom he acted as solicitor in the transaction, it was held that the latter mortgagee was not affected with constructive notice of the solicitor's fraud on the original mortgagee. But, it appearing that the peculiar form of the deed of transfer of the mortgage and of the receipt endorsed thereon were sufficient to put a solicitor innocent of the fraud upon inquiry whether any money had been paid on the execution of the transfer, it was considered that the latter mortgagee was affected through the solicitor with notice of the equity arising from the fact that no money had been paid, notwithstanding the solicitor's fraud (*q*). So, where a solicitor, being one of three trustees entitled to certain leasehold land, the trust not being disclosed on the face of the title deeds, sold and assigned the land to a purchaser, for whom he acted as solicitor, by forging the signatures of his co-trustees to a letter of authority to sell and to the deed of assignment, and it was considered that the deed was a nullity on their part, but passed the legal estate in one-third of the land, the Court held that the purchaser was affected, through the solicitor, with notice of the trusts; for it was said that if the client would be affected with constructive notice of a trust, the existence

(*p*) *Atterbury v. Wallis*, 8 De G. M. & G. 454, 466; *Roland v. Hart*, L. R. 6 Ch. 678, 682, 683.

(*q*) *Kennedy v. Green*, 3 My. & K. 699: see also *Re Southampton's Estate*, 16 Ch. D. 178, 184.

of which is known to his solicitor, in the case where there was no fraud, the fact that the solicitor was committing a fraud in relation to the trust could not afford any reason why the client should not be affected with constructive notice of the existence of the trust (*r*). The application of the rule, where the solicitor had notice of some equity not arising out of his own fraud and the only fraud was in his concealment thereof from his client, is illustrated by the following cases:—A solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as solicitor of all the parties to the transaction and suppressing all mention of the sub-mortgage. It was held that the new mortgagee was affected, through the solicitor, with notice of the sub-mortgage; notwithstanding that it was fraudulent or wrongful of the solicitor to conceal the sub-mortgage from him (*s*). A solicitor entitled to an equitable interest in land in Middlesex mortgaged the same to A. by deposit of title deeds and letters of charge, which were not registered. He afterwards mortgaged the same interest by registered deed to B., for whom he acted as solicitor in the transaction. It was held that B. must be taken to have had notice of A.'s mortgage, the Court refusing to find a ground of exception from the general rule in the fact that it was to the solicitor's interest to conceal the prior mortgage from A., and declining to presume that in this conflict of interest and duty the solicitor consulted his own interest in preference to performing his duty to his client (*t*). The exception to the rule was allowed to prevail in *Sharpe v. Foy* (*u*), where a husband and wife mortgaged land, to which the

Atterbury v. Wallis.

Bradley v. Riches.

Sharpe v. Foy.

r) *Boutet v. Savage*, L. R. 2 Eq. 134.

s) *Atterbury v. Wallis*, 8 De G. M. & G. 454: see also *Rolland*

v. Hart, L. R. 6 Ch. 678.

t) *Bradley v. Riches*, 9 Ch. D. 189.

u) L. R. 4 Ch. 35.

Cave v. Cave.

wife was entitled at common law, but which was subject to a covenant for settlement. The same solicitor acted for the mortgagors and the mortgagee. The mortgagors informed the solicitor of the existence of the covenant, but it was agreed between them that the matter should not be mentioned to the mortgagee. It was decided that the mortgagee was not affected, through the solicitor, with notice of the covenant, as the solicitor was party to a scheme of fraud. Again, in *Cave v. Cave* (x), a solicitor, who was the sole trustee of a marriage settlement, wrongfully applied part of the trust funds in the purchase of certain land, which was conveyed to his brother. A. advanced to the brother 4,500*l.* on a first mortgage of this land. The solicitor acted for A. in this transaction, but represented to A. that his brother was the owner of the land, and that the mortgage contained absolute covenants for title by the brother. The solicitor also raised loans for his brother from other persons on mortgage of the same land. In these circumstances the Court found that the trust funds were applied in purchase of the land in pursuance of a scheme of fraud to which the solicitor was a party, his design from the first being to enable his brother to raise money on mortgage of the land; and it was held that A. was not affected, through the solicitor, with notice of the equities in favour of the *cestui-que-trusts* under the settlement.

Effect of the
Conveyancing
Act, 1882, s. 3.

Section 3 of the Conveyancing Act, 1882 (y), preserves to principals the benefit of the exception established as above mentioned (z) in the case of the agent's fraud. But the distinctions drawn with regard to this exception have been greatly modified by the operation of sub-section (1) (ii) of the same enactment. Thus, in *Taylor v. London and County Banking Co.* (a), one Tasker had

Taylor v.
London and
County Bank.

(x) 15 Ch. D. 639.
(y) Above, p. 246.

(z) Above, p. 248.
(a) 1901, 2 Ch. 231.

appropriated part of certain mortgages to which he was entitled in satisfaction of a breach of trust committed by him as trustee of the Brockman settlement. Afterwards, on the appointment of Nixon as a new trustee of the Tasker settlement, whereof Tasker had been previously sole trustee, and had apparently converted part of the trust funds to his own use, Tasker transferred these mortgages to Nixon and himself, representing that they were part of the funds subject to the trusts of the Tasker settlement; and in this business Tasker acted as Nixon's solicitor. It was argued for the persons entitled under the Brockman settlement *b*), on the authority of *Boursot v. Savage* (*c*), that notice of the equity in their favour must be imputed to Nixon in consequence of Tasker having so acted as his solicitor. But it was held (*d*) that the doctrine laid down in *Boursot v. Savage* is now subject to the modifications introduced by the 3rd section of the Conveyancing Act, 1882 (*e*); and that, as knowledge of the appropriation to the Brockman settlement did not come to Tasker as Nixon's solicitor or in the same transaction in which the question of notice arose, Nixon could not be affected thereby. The principle of this decision appears to affect not only the case of *Boursot v. Savage*, but those of *Atterbury v. Wallis* and *Bradley v. Riches* (*f*) as well. For in neither of these cases was the knowledge sought to be imputed to the client acquired by the solicitor in his capacity of solicitor for that client or in the transaction in which the question of notice arose.

As a general rule, a purchaser is affected by notice to his counsel, solicitor, or other agent, notwithstanding that the agent be also employed as the agent of the

Vendor or mortgagor acting as purchaser's or mortgagee's solicitor.

(*b*) 1901, 2 Ch. 242.

(*c*) L. R. 2 Eq. 134 : above, p. 250.

(*d*) 1901, 2 Ch. 257-259.

(*e*) Above, p. 246.

(*f*) Above, p. 251.

vendor (*g*) or be himself the vendor (*h*). But when the vendor is a solicitor or other agent, it must appear clearly that he acted generally as the solicitor or agent of the purchaser in the transaction, in order that the knowledge of the agent may be imputed to the purchaser. The purchaser will not be affected with notice if the vendor be merely employed to prepare the conveyance (*i*). The rule is the same between mortgagor and mortgagee (*k*).

What inquiries ought a purchaser to make?

It will be observed that, under the Conveyancing Act, 1882 (*l*), a purchaser will not be affected with notice of anything which would not have come to the knowledge of himself or his agent if such inquiries and inspections had been made by the one or the other as ought reasonably to have been made. The question then arises, what inquiries and inspections ought reasonably to be made? The answer to this appears to be: such inquiries and inspections as are usually made by a prudent purchaser buying under an open contract (*m*); for, as we have seen (*n*), a purchaser buying under special conditions limiting his right to investigate the vendor's title is fixed with constructive notice of all equitable incumbrances which he would have discovered if he had made such inquiries. And it should be noted that a purchaser or mortgagee taking the legal estate, but omitting to make reasonable and proper inquiries and inspections, will be affected

(*g*) *Le Nere v. Le Nere*, Amb. 436; *Dryden v. Frost*, 3 My. & Cr. 670; *Rolland v. Hart*, L. R. 6 Ch. 678.

(*h*) *Kettlewell v. Watson*, 21 Ch. D. 685.

(*i*) *Espin v. Pemberton*, 3 De G. & J. 547, 554; *Kettlewell v. Watson*, 21 Ch. D. 685.

(*k*) See the cases cited in the three preceding notes and above, pp. 250—253.

(*l*) Above, p. 246.

(*m*) *Wilson v. Hart*, L. R. 1 Ch. 463, 467; *Patman v. Harland*, 17 Ch. D. 353, 355-358; *Oliver v. Hinton*, 1899, 2 Ch. 264; *Berwick & Co. v. Price*, 1905, 1 Ch. 632, 638; *Perham v. Kempster*, 1907, 1 Ch. 373, 379; see also *Molyneux v. Havtreay*, 1903, 2 K. B. 487.

(*n*) Above, p. 212; see also *Taylor v. London and County Banking Co.*, 1901, 2 Ch. 231, 258.

with notice of such prior equities as he would have discovered if he had made such inquiries, although the omission to make the inquiries did not arise from any fraudulent motive, but was simply owing to gross negligence. Thus, where a purchaser bought land in good faith through an agent, who was not a solicitor, and required no abstract of title nor production of the title deeds, and the deeds were in the possession of an equitable mortgagee, it was held that the purchaser, to whom the legal estate had been conveyed, took the same with constructive notice of and subject to the charge created by the deposit of the deeds (*o*). Where, however, a purchaser makes due inquiry for the title deeds and a reasonable excuse is given for their non-production, he will not be affected with notice of any equity arising out of their absence, and may, if he obtain the legal estate, avail himself of it and of the defence of purchaser for value in good faith without notice as against all persons asserting any such equity (*p*).

*Oliver v.
Hinton.*

Where a purchaser has notice that the property bought is subject to charges or incumbrances, he must inquire what these are, or he will be taken to have had notice of them all. Thus, where one took a legal mortgage from two partners of property formerly belonging to them and a third partner since retired as tenants in common, and the retiring partner had by deed conveyed his share in the property to the continuing partners "subject to all charges and mortgages affecting the same," and this deed was recited in the

Notice that property is subject to charges or incumbrances.

(*o*) *Oliver v. Hinton*, 1899, 2 Ch. 264; and see *Berwick & Co. v. Price*, 1905, 1 Ch. 632; *Walker v. Linom*, 1907, 2 Ch. 104.

(*p*) *Hewitt v. Lonsdale*, 9 Hare, 449, 458; and see *Hunt v. Elmes*, 2 De G. F. & J. 578; *Ratcliffe v.*

Barnard, L. R. 6 Ch. 652; *Agra Bank v. Barry*, L. R. 7 H. L. 135, 157; *Northern Counties of England Fire Insurance Co. v. Whipp*, 26 Ch. D. 482; *Re Ingdon*, 1893, 1 Ch. 352. See also *Molyneux v. Hawtrey*, 1903, 2 K. B. 487.

mortgage without the words in inverted commas, and the mortgagee, knowing of two equitable charges on the property and believing that these were all the incumbrances, made no inquiry whether this was the case or whether there were any other mortgages or charges, it was held that the mortgagee was affected with notice of a third equitable charge which existed on the property (*q*). So, where lands were mortgaged subject to land tax and tithe rentcharge and "to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the said lands," and the mortgagee made no inquiry what other payments and outgoings there were to which the lands were subject, it was decided that he had constructive notice of an annual rent of a certain quantity of corn charged thereon in equity (*r*).

§ 2.—*Of Sales by Trustees.*

Sales by
trustees.

The first observation to be made with regard to sales by trustees is that trustees holding the legal estate in lands under a simple trust for the benefit of some other person or persons have no power to sell without the consent of all the persons who are in equity beneficially entitled to the lands (*s*). In such cases the trustee is but an instrument to execute the will of *cestui-que-trust*. The latter may sell as he will, and the trustee is bound to convey at his bidding (*t*). But the trustee cannot bind any beneficiary by contract with or conveyance to any purchaser who has notice of the trust: although conveyance of the trust property by the trustee to a

(*q*) *Jones v. Williams*, 24 Beav. 47.

(*r*) *Re Alms Corn Charity*, 1901, 2 Ch. 750.

(*s*) *Lee v. Saumes*, 36 W. R. 884; cf. *Re Baker and Selmon's Contract*, 1907, 1 Ch. 238, where the *cestui-*

que-trusts had in writing authorised the trustee to sell, and were bound at law by the contract as undisclosed principals; see above, p. 160, and n. (*u*); below, Chap. XIX. § 2.

(*t*) See above, p. 167.

bonâ fide purchaser for value without notice of the trust may deprive *cestui-que-trust* of his equitable rights in the land (*u*). To enable trustees to sell lands without the concurrence of their *cestui-que-trusts* an express power to that effect must be inserted in the instrument creating the trust, or the lands must be vested in them upon a special trust for sale. When such powers of or trusts for sale are created they must be carried out in all respects according to the intention of their creator; they must not, for example, be exercised before the time at which it has been declared that they shall arise (*x*). Thus, when lands are vested in trustees on trusts for one for life, and after his death on trust for sale or on trust for others with power of sale, the trust for or power of sale cannot be validly exercised in the lifetime of the tenant for life—not even with his consent and concurrence (*y*), nor by order of the Court (*z*). But the intention of the author of a trust or power will be collected from the whole of the instrument creating the same, and may in some case be ascertained at the sacrifice of the literal interpretation of every expression therein contained. Thus, where lands were devised to one for life, and after her death to trustees to sell as soon as conveniently might be after the testator's death, it was held that the will in effect created a trust for sale immediately exercisable with the consent of the tenant for life (*a*). So a devise on trust to sell with

Trusts for or powers of sale.

Mills v. Dugmore.

(*u*) Wms. Real Prop. 186, 187, 21st ed.

(*x*) See *Johnstone v. Baber*, 8 Beav. 233; Sug. Pow. 266, 8th ed.; Farwell on Powers, 147, 2nd ed.

(*y*) *Mosley v. Hyde*, 17 Q. B. 91; *Went v. Stallbrass*, L. R. 8 Ex. 175; *Re Bryant and Birmingham's Contract*, 44 Ch. D. 218; *Re Head's Trustees and Macdonald*, 45 Ch. D. 310. A sale may of course be made in such

cases with the concurrence of all the beneficiaries, if *sui juris*, or the tenant for life may sell under the Settled Land Acts; see above, pp. 168, 180.

(*z*) *Blacklow v. Laws*, 2 Hare, 40; *Johnstone v. Baber*, 8 Beav. 233; *Gosling v. Carter*, 1 Coll. 644, 652; *Carlyon v. Truscott*, L. R. 20 Eq. 348.

(*a*) *Mills v. Dugmore*, 30 Beav. 104.

all convenient speed and within five years after the testator's death has been held to enable the trustees to make a good title to a purchaser after the five years had expired, the testator's expressions being considered to be merely directory and not imperative (*b*). A trust for sale with all convenient speed nevertheless allows the trustees to exercise a reasonable discretion as to the time of sale (*c*), and they may postpone the sale if such a course be beneficial to their *cestui-que-trusts* (*d*). But trustees for immediate sale, who postpone sale indefinitely without good reason, will be accountable for any loss thereby caused to the trust estate (*e*).

Acceleration of time for exercising a power or trust.

When lands are settled on several persons for successive life estates, with power for each tenant for life when in possession to charge the estate with a jointure or portions, it appears that, as such charges are a burden on the remainderman, the time for exercising the power cannot be accelerated by the surrender to any tenant for life of a life estate prior to his own; he must wait, before he can well exercise the power, until the time has arrived when he would have become entitled in possession according to the limitations of the settlement. But where lands are so settled with a power of sale exercisable with the consent of the tenant for life in possession, the power, being merely administrative and

(*b*) *Pearce v. Gardner*, 10 Hare, 287; see also *Cuff v. Hall*, 1 Jur. N. S. 972, where a will conferred a power to postpone sales, but not for a longer period than ten years from the testator's death.

(*c*) *Buxton v. Buxton*, 1 My. & Cr. 80, 93; *Marsden v. Kent*, 5 Ch. D. 598. For the purpose of determining the respective rights of tenant for life and remainderman, one year is considered to be the time within which such a trust might reasonably have been exercised; *Larry v. Warrington*,

6 Madd. 155; *Vickers v. Scott*, 3 My. & K. 500.

(*d*) *Morris v. Morris*, 4 Jur. N. S. 802.

(*e*) *Cuff v. Hall*, 1 Jur. N. S. 972; *Devaynes v. Robinson*, 24 Beav. 86; *Fry v. Fry*, 27 Beav. 144. See *Re Davidson*, 11 Ch. D. 341, 348, on the question how far concurrence in the postponement of a sale directed to be made with all convenient speed may amount to an election by the beneficiaries to take the property *in specie*.

only altering the state of investment of the trust property and not diminishing the remainderman's interest, may be exercised with the consent of a tenant for life in actual possession, although so entitled through the surrender of a prior life estate (*f*). Where lands are vested in trustees on trust for one for life and after his death on trust for sale or on trust for others with power of sale, so that the settlor's intention is that the trust or power shall not arise until such death (*g*), the time for exercising the same cannot be accelerated by a surrender of the life interest (*h*).

When lands are settled by deed on trust for sale, and to hold the proceeds of sale for the benefit of certain persons successively and after their death for their children or others absolutely, which is a very common form of marriage settlement, it is usually provided that the sale shall be made at the request or with the consent of the tenants or tenant for life, and after the death of every tenant for life at the discretion of the trustees (*i*). In such cases there is no intention that the trustees should proceed to sell immediately (*k*); the trust is well exercised if the sale be made during the lifetime of any tenant for life or within a reasonable time after the beneficiaries entitled to the capital of the purchase money have become entitled in possession (*l*). If, however, the lands remain unsold for a long time after the interests of all persons absolutely entitled to the proceeds of sale have vested in possession, the question

Trusts for sale and settlement of the purchase-money.

(*f*) *Truell v. Tyson*, 21 Beav. 137; *Sug. Pow.* 270, 271, 8th ed.; *Farwell on Powers*, 152, 2nd ed.

g Above, p. 257.

h See *Cox v. Day*, 13 East, 118; *Re Hood's Trustees and Macdonald*, 45 Ch. D. 310.

i 3 Davidson, *Proc. Conv.* 858, 3rd ed.; *Williams on Settlements*, 125; 2 *Key & Elph. Proc.*

Conv. 506, 4th ed.; 497, 8th ed.

(*k*) See 1 *Dart, V. & P.* 59, 5th ed.; 64, 6th ed.; 66, 7th ed.

l *Beggs v. Pearce*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 313; *Re Harsnall*, 1909, 1 Ch. 631, 635.

Trusts
declared by
will for sale
in order to
pay testator's
debts.

Re Horsnaill.

arises whether they have not elected to take the property *in specie*, and so put an end to the trust for sale (*m*). If so, it would be necessary to obtain their concurrence upon a sale of the property. The same question of election by the beneficiaries to take the property may of course arise in the case of a trust for sale created by will (*m*). If a trust for sale be declared by a will merely for the purposes of a settlement of the purchase-money made by the will, the same considerations apply with regard to the time of sale as in the case of a like settlement made by deed (*n*). Trusts declared by will for the sale of lands are, however, generally created for the purpose, amongst other objects, of raising money to pay the testator's debts or debts and legacies; and in all well-drawn wills a power for the trustees to postpone the sale is invariably inserted (*o*). Such a power remains effective until all the beneficial interests in the settled property have vested absolutely in possession; and where the whole of certain lands are devised to trustees on trust for sale with power at their discretion to postpone the sale, and the proceeds of sale are bequeathed in definite shares, each share being given in trust for one for life with remainder to his or her children, the vesting in possession of one or more of the shares will not put an end to the power of postponement, which will continue until all the shares have vested absolutely in possession (*p*). Trusts created by will for sale of lands in order to pay the testator's

(*m*) *Crabtree v. Bramble*, 3 Atk. 680; *Davies v. Ashford*, 15 Sim. 42; *Mutlow v. Bigg*, 1 Ch. D. 385; *Re Gordon*, 6 Ch. D. 531; *Re Davidson*, 11 Ch. D. 341; *Holder v. Lofts*, cited *Re Lewis*, 30 Ch. D. 654, 656; and see *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Re Grimthorpe*, 1908, 2 Ch. 675.

(*n*) See 1 Dart, V. & P. 59,

5th ed.; 64, 6th ed.; 66, 7th ed.; and cases cited in nn. (*l*), (*m*), above.

(*o*) 4 Davidson, Prec. Conv. 6, 7, 49, 3rd ed.; 2 Key & Elph. Prec. Conv. 781, 782, 788, 4th ed.; 745, 746, 752, 8th ed.; Davidson's Concise Precedents, 566, 575, 18th ed.

(*p*) *Re Horsnaill*, 1909, 1 Ch. 631, 635.

debts appear to fall within the rule already mentioned (*q*) with regard to the time for exercising the power given by statute to sell real estate charged by will with debts (*r*)—namely, that if the sale be made within twenty years after the testator's death, the purchaser is not bound to inquire whether any of the testator's debts remain unpaid. After the expiration of that period, the purchaser should inquire whether any debts remain unpaid, if the only object of the trust for sale be to raise money to pay debts; but of course if the trusts of the purchase-money be not only to pay debts, but to hold the surplus on trust for certain persons in succession, the question of the propriety of selling a long time after the testator's death depends on the same considerations as occur in other cases of settlements. Here it may be noted that the powers given to executors by the Land Transfer Act, 1897 (*s*), of selling their testator's real estate to satisfy his debts appear to be governed by the same rules as were previously applicable to sales by executors of their testator's leaseholds (*t*); so that if real estate be sold by executors under such powers more than twenty years after the testator's death, the purchaser will be entitled to presume that the sale is rightly made, and need not inquire whether any of the testator's debts remain unpaid. In regard to the general question of the time for exercising trusts for sale, Lord St. Leonards observed that "people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and look fairly at what they are about" (*u*). But it appears that an out-and-out trust for sale of

Executors'
power of sale
under the
Land
Transfer Act,
1897.

(*q*) Above, p. 228, n. (*x*).

(*r*) Above, p. 228.

(*s*) Stat. 60 & 61 Vict. c. 65,
s. 2; above, pp. 228, 232.

(*t*) Above, pp. 217, 218, 228,
n. (*x*).

(*u*) *Stroughill v. Austey*, 1 De
G. M. & G. 635, 654.

lands, if not determined by the beneficiaries' election, may be exercised after any lapse of time (*x*).

Rule against
perpetuities in
connection
with trusts
for and
powers of
sale.

A trust for or power of sale of lands to arise at a future time is invalid, unless so limited that it must necessarily become exercisable within the period allowed by the rule against perpetuities (*y*). But a trust for sale arising immediately, and at once effecting a conversion into personalty of the beneficial interest in the lands to be sold, is not obnoxious to the rule against perpetuities, although no limit of time be mentioned within which the trust must be exercised (*z*). And it is established that powers of sale immediately conferred on trustees over property comprised in settlements are not invalid for want of an express declaration that they must be exercised within the time given by the rule against perpetuities (*a*). Such powers are therefore exercisable within the period so allowed, though not, as a rule, after the settlement has come to an end by the vesting in possession of the estate in fee simple in remainder or reversion or other the absolute interest in the property settled (*b*). But such powers may remain exercisable after absolute interests have vested in possession, if such were the intention of the donor of the power, so long as the rule against perpetuities is not infringed. Thus, where the absolute interest in any

(*x*) See above, pp. 259, n. (*l*), 260, n. (*m*).

(*y*) *Re Davenport*, 1893, 3 Ch. 421; *Goodier v. Edmunds*, ib. 455; *Re Appleby*, 1903, 1 Ch. 565; cf. *Re Darius and Kent's Contract*, 1910, W. N. 104.

(*z*) *Biggs v. Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 313.

(*a*) *Biddle v. Perkins*, 4 Sim. 135; *Bouce v. Hanning*, 2 Cr. & J. 334; *Waring v. Coventry*, 1 My. & K. 249; *Wood v. White*, 4 My. &

Cr. 460, 482; *Lantsbery v. Collier*, 2 K. & J. 709; *Peters v. Lewes, &c. Ry.*, 18 Ch. D. 429, 433, 434; Sug. Pow. 848-851, 8th ed.; 1 Jarm. Wills, 291, 4th ed.; 261, 5th ed.; 1 Dart, V. & P. 68, 69, 6th ed.; 69, 7th ed.; Farwell on Powers, 111, 2nd ed.

(*b*) *Wolley v. Jenkins*, 23 Beav. 53; 3 Jur. N. S. 324; *Taite v. Swinstead*, 26 Beav. 525; *Re Brown's Settlement*, L. R. 10 Eq. 349; Sug. Pow. 859-862, 8th ed.; 3 Davidson, Prec. Conv. 570-577, 3rd ed.; Farwell on Powers, 32, 33, 2nd ed.

settled property is ultimately limited to several persons as tenants in common, and a power of sale is given with the intention that it shall be exercised for the purpose of facilitating the division of the property after their interests have vested in possession, the power is exercisable within a reasonable time after such interests have so vested, provided that the limits allowed by the rule against perpetuities be not exceeded (*c*). If property be given to trustees in trust for persons entitled, not successively, but for immediate absolute interests therein, it seems that a power of sale given to the trustees, and not limited as to the time of its exercise, would be void (*d*); but if some of the beneficiaries were infants, the power might perhaps be exercisable during their minority.

Where trustees hold lands under a trust for or with power of sale, and an order of the Court has been made for the administration of the trust, they cannot properly exercise the trust or power without the direction of the Court (*e*).

Order of the Court for administration of the trust.

The duties of trustees for sale, whether acting under a trust for or power of sale, are to sell the trust property to the best advantage: that is, in the manner most beneficial to all the *cestui-que-trusts*; to receive the purchase money and dispose of it in due accordance with the trusts; to obtain proper advice as to the value of the trust property, and the best mode of sale (*f*), and generally to take all other precautions which a prudent man of business would take in conducting his own

Duties of trustees for sale.

(*c*) *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624; *Re Sudeley and Baines & Co.*, 1894, 1 Ch. 334; *Re Jump*, 1903, 1 Ch. 129; *Re Howsmill*, 1909, 1 Ch. 631, 635.

(*d*) *Tate v. Swinstead*, 26 Beav. 525, 529.

(*e*) *Lewin on Trusts*, 374, 391, 6th ed.; 493, 526, 11th ed.; *Prior v. Prior*, 35 Ch. D. 297; see above, p. 224.

(*f*) *Jessel, M. R., Re Cooper and Allen to Harlech*, 4 Ch. D. 802, 815.

affairs (*g*). Trustees for sale should be especially careful to avoid any misdescription in the particulars or contract of the property, which they are entrusted to sell (*h*), for if by their negligence in this respect the trust estate should suffer any loss, it appears that they would be liable to make it good (*i*). Under the Trustee Act, 1893 (*k*), where a trust for sale or a power of sale of property is vested in a trustee by any instrument coming into operation after the year 1881, and in the absence of any expression of a contrary intention, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction or to rescind any contract for sale and to re-sell, without being answerable for any loss. These powers are similar to those which were generally inserted in instruments made before the year 1882 and creating trusts for or powers of sale (*l*); but neither the express nor the statutory powers appear to confer on trustees much greater authority or discretion than they

(*g*) *Speight v. Gaunt*, 22 Ch. D. 727, 9 App. Cas. 1; see also *Falkner v. Equitable Reversionary Society*, 4 Drew. 352.

(*h*) See above, p. 70.

(*i*) See *White v. Cuddon*, 8 Cl. & Fin. 766, 788, 789, 793, 798. It is thought that trustees for sale are justified in stipulating either that no compensation shall be allowed for errors of description (which seems best for them) or that compensation shall be allowed, and that on either side, for such errors, as it does not appear that either of these conditions is depreciatory; see *Hill v. Buckley*, 17 Ves. 395; *Crompton v. Melbourne*, 5 Sim. 353; *Hobson v. Bell*, 2 Beav. 17, 19, 23; *Dunn*

v. Flood, 28 Ch. D. 586, 591 *sq.*; 1 Key & Elph. Prec. Conv. 267, n. (*c*), 4th ed.; 255, n. (*g*), 8th ed.; above, pp. 65, 66; below, Chap. XII., § 4.

(*k*) Stat. 56 & 57 Vict. c. 53, s. 13, replacing 44 & 45 Vict. c. 41, s. 35.

(*l*) Like powers were given by Lord Cranworth's Act to trustees having an express power of sale over any hereditaments by virtue of an instrument executed on or after the 28th Aug. 1860; Stat. 23 & 24 Vict. c. 145, ss. 1, 2, 34; but these powers were not usually relied on in practice; *Davidson, Prec. Conv.* vol. iii. 557, 565, n. (*u*), 858, 1013-1018, 3rd ed.; vol. iv. 33, n. (*h*), 4th ed.

possess independently of them under the rules of equity (*m*). And in exercising either the statutory or similar express powers, trustees are bound to apply the same principles which should regulate their action in the absence of express authority. In both cases Courts of Equity exact a strict adherence to the duties of trustees for sale (*n*). Thus it was held that trustees, expressly empowered to make such special conditions of sale as they might think fit, were no more at liberty to make depreciatory conditions of sale, unless strictly necessary in the state of their title, than were trustees who had no such express authority. And if depreciatory conditions were unnecessarily made on a sale by trustees, the Court would restrain the sale at the

m) Thus, in the absence of any restriction as to the mode of sale, trustees for sale might sell the trust property either all together or in lots, and either by public auction or private contract; *Sug. V. & P.* 60, 61; *Lewin on Trusts*, 383, 384, 6th ed., 507-511, 11th ed. They might make such special conditions of sale as might be reasonable and necessary in the state of their title; *Hobson v. Bell*, 2 Beav. 17; *Falkner v. Equitable Reversionary Society*, 4 Drew. 352; *Lewin on Trusts*, 384, 6th ed.; but they might not depreciate the trust property by unnecessary conditions of sale; *Dance v. Goldingham*, L. R. 8 Ch. 902. They might concur with other persons in selling the trust property together with other property, if such a mode of sale were clearly advantageous to the *cestui-que-trusts*, and the trustees took due precautions to ascertain that they would receive a proper proportion of the purchase money, and were careful to receive the money themselves; but otherwise not; *Rede v. Oakes*, 4 De G. J. & S. 505; *Re Cooper and Allen to Harlech*, 4 Ch. D. 802, 814-821.

They might consequently join with the owners of prior charges in selling the whole property free from incumbrances, or they might sell the particular interest only, which had been vested in them on trust for sale, whichever course would be likely to be most advantageous to their *cestui-que-trusts*; see 4 Ch. D. 817. Trustees were justified in fixing a reserved price on a sale by auction, and they might buy in at that price; *Re Peyton's Settlement*, 30 Beav. 252; *Sug. V. & P.* 62; but if, after buying in, they made undue delay in effecting a sale, they were answerable for any loss occasioned thereby; *Taylor v. Tabrum*, 6 Sim. 281. It appears also that trustees might vary or rescind any contract for sale, if such a course clearly appeared to be for the advantage of their *cestui-que-trusts*; *Falkner v. Equitable Reversionary Society*, 4 Drew. 352; *Lewin on Trusts*, 384, 6th ed., 510, 11th ed.

(*n*) *Dance v. Goldingham*, L. R. 8 Ch. 902, 907, n., 909, 910; *Dunn v. Flood*, 25 Ch. D. 629, 634, 28 Ch. D. 586, 591, 592.

instance of any *cestui-que-trust* (*o*), or the purchaser might resist the specific performance of the contract (*p*). In this particular instance, however, the legislature has interposed; and with regard to sales made after the 24th of December, 1888, it is now enacted as follows (*q*):—

(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

Trustees are, moreover, expressly empowered to sell subject to any of the stipulations implied in contracts by virtue of the Vendor and Purchaser Act, 1874 (*r*), or the Conveyancing Act, 1881 (*s*). Subject to these enactments, however, trustees for sale must still exercise the discretions conferred upon them by the above-mentioned statutory powers (*t*) in a reasonable manner, and with an eye to obtaining the best advantage they can for their *cestui-que-trusts* (*u*).

Trustees for
sale must sell
for money.

It is important to note, with regard to the exercise of a trust for or power of sale, that the term “sale” is, as a rule, taken in the strict sense of conveyance in con-

(*o*) *Dance v. Goldingham*, L. R. 8 Ch. 902.

(*p*) *Rede v. Oakes*, 4 De G. J. & S. 505; *Dunn v. Flood*, 25 Ch. D. 629, 28 Ch. D. 586.

(*q*) Stat. 56 & 57 Vict. c. 53, s. 14, replacing 51 & 52 Vict. c. 59, s. 3.

(*r*) Stat. 56 & 57 Vict. c. 53, s. 15, replacing 37 & 38 Vict. c. 78, s. 3.

(*s*) Stat. 44 & 45 Vict. c. 41, s. 66.

(*t*) Above, p. 264.

(*u*) Above, p. 265, n. (*m*).

sideration of a price paid in money (*x*). Trustees acting under a trust for or power of sale are not, therefore, at liberty to accept any other consideration for their conveyance than the payment of money. They must not, for example, sell in consideration of receiving stock, shares, bonds, debentures or similar securities (*x*), or in consideration of the grant of a rentcharge (*y*), unless the terms of the trust or power specially authorize them to convey for such considerations (*z*). For trustees are bound strictly to pursue the powers or authorities, with which the creator of the trust has invested them; and they cannot, as a rule, obtain any enlargement of their authority by an application to the Court (*a*). So, also, a conveyance by way of exchange or partition is not a valid execution of a trust for or power of sale (*b*). But trustees for sale, who are authorized to invest the purchase money on real securities, may well agree to leave a proper proportion of the purchase money on mortgage of the lands sold (*c*). A

(*x*) Above, p. 1; Stirling, J., *Payne v. Cork Co., Ltd.*, 1900, 1 Ch. 308, 314; see also *Re A. B.*, 1899, W. N. 233; and cf. *Re Ware*, 1892, 1 Ch. 344.

(*y*) *Read v. Shaw*, Sug. Pow. 953, 8th ed.; *ibid.* 864; cf. *Re Ware*, 1892, 1 Ch. 344; Farwell on Powers, 559, 2nd ed.

(*z*) See *Re Morgan*, 24 Ch. D. 114, 115. In *Re Jackson*, 44 Sol. J. 573, it was held that trustees empowered to sell a testator's real estate, "upon such terms and conditions and generally in such manner as they could do if absolute owners thereof," were at liberty to sell either wholly or partly in consideration of a fee farm rent.

(*a*) See *Re Morrison*, 1901, 1 Ch. 701; *Re New*, 1901, 2 Ch. 534, 544, 545; *Re Tollemache*, 1903, 1 Ch. 457, 955. This rule is, however, subject to an exception, where owing to circumstances unforeseen by the author of the

trust there arises some emergency which can only be met by taking some course of action not expressly authorised; and in such cases, but in such cases only, the Court may and, if it thinks fit, will sanction the performance by the trustees of acts of this kind; see the two last cases cited; and *Re Wells*, 1903, 1 Ch. 848.

(*b*) *M'Queen v. Farquhar*, 11 Ves. 467; Sug. Pow. 857, 858, 8th ed. But where there is a power of sale and investment of the proceeds in the purchase of other hereditaments, it appears that an exchange or a partition may be effected circuitously by sale and investment of the purchase money in the lands desired to be taken in exchange or held in severalty; Sug. Pow. 858, 8th ed. As to effecting a partition under a power of sale and exchange, see *Re Frith and Osborne*, 3 Ch. D. 618.

(*c*) Observe the terms of the

Whether a trust for or power of sale authorizes a mortgage.

trust for or power of sale created for the purpose of effecting an out-and-out conversion of lands into money does not authorize a mortgage of the lands (*d*). But if the intention of the author of the trust or power were simply to facilitate the raising of a sum of money charged on the lands, and not to disturb the ownership of the lands further than should be necessary in order to satisfy the charge, a mortgage made under the trust or power may be supported as a conditional sale (*e*).

Whether a trust or power to mortgage authorizes a sale, or a mortgage with power of sale.

A trust or power to mortgage lands does not authorize a sale of them (*f*). Upon this ground it has been held that a power to mortgage lands does not authorize a mortgage of them with power of sale (*g*); but in later cases this rule has been abandoned in favour of the doctrine that a power of sale is an usual and a necessary incident of a mortgage, and may therefore properly be inserted in a mortgage made under a trust or power to mortgage (*h*). A trust for sale of lands does not authorize a lease of them, so that a trustee for sale of leaseholds is not justified in disposing of them by way of underlease at an improved rent (*i*). But where lease-

contract for sale under the Settled Land Acts sanctioned by the House of Lords in *Bruce v. Ailsbury*, 1892, A. C. 356, 357; and see *Thurlow v. Mackeson*, L. R. 4 Q. B. 97; *Bettyes v. Maynard*, 31 W. R. 461; *Re Hotham*, 1902, 2 Ch. 575. Such a contract may be enforced specifically; *Starkey v. Barton*, 1909, 1 Ch. 284.

(*d*) *Haldenby v. Spofforth*, 1 Beav. 390; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Deraynes v. Robinson*, 24 Beav. 86.

(*e*) See *Stroughill v. Anstey*, 1 De G. M. & G. 465; *Page v. Cooper*, 16 Beav. 400; Sug. Pow. 425, 8th ed.; Lewin on Trusts, 377, 6th ed.; 497, 11th ed.

(*f*) *Drake v. Whitmore*, 5 De G. & S. 619; *Cook v. Dawson*, 29 Beav. 123.

(*g*) *Clarke v. Royal Panopticon*, 4 Drew. 26.

(*h*) *Bridges v. Longman*, 24 Beav. 27, 29; *Cook v. Dawson*, 29 Beav. 123, 128; *Re Chawner's Will*, L. R. 8 Eq. 569; Farwell on Powers, 447-450, 2nd ed.

(*i*) *Evans v. Jackson*, 8 Sim. 217. An executor or administrator, however, where the assets include leaseholds, may grant an underlease if such a mode of disposition be beneficial to the estate, but not otherwise, and the title of the underlessee is dependent on the underlease being beneficial; Wms. Exors. 939, 940, 7th ed.; *Keating v. Keating*, Ll. & G. t. Sug. 133; *Hackett v. M'Namara*, Ll. & G. t. Plunk. 283; *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236, 243.

holds are vested in trustees for sale they are justified in making a sale of them by way of underlease—that is, in granting an underlease for the whole term less a day or two at the rent at which they hold in consideration of receiving a lump sum of money—if such a course be advantageous to the trust estate; for this method of disposition is essentially a transfer in consideration of a price in money, that is, a sale, and the assurance of the property by way of underlease is regarded as mere machinery for making the conveyance to the purchaser (*k*). Thus if such trustees propose to sell their leaseholds in lots as they lawfully may (*l*), they may well sell them under the usual conditions that the purchaser of the largest lot in value shall take an assignment of the lease and grant to the other purchasers underleases at apportioned rents and that in case any of the lots shall not be sold the vendors themselves shall grant similar underleases (*m*). So also if such trustees hold land let together with other land for a term of years at one entire rent, they may well sell their land by way of underlease at an apportioned rent (*n*). And it appears that trustees for sale will be justified in selling leaseholds by way of underlease in any circumstances in which such a course is expedient in the interests of their *cestui-que-trusts* (*o*).

Sale of leaseholds by way of underlease.

Trustees for sale of land, unless expressly authorized by the instrument creating the trust, are not entitled to sell the land apart from the timber growing thereon (*p*),

Timber and minerals.

(*k*) *Re Judd and Poland and Skelcher's Contract*, 1906, 1 Ch. 684, overruling *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383; and see *Re Webb*, 1897, 1 Ch. 144, 149; above, pp. 1, 267.

(*l*) Above, p. 264.

(*m*) *Re Judd and Poland and Skelcher's Contract*, ubi sup.; see above, p. 82; below, Chap. X. § 2, at end; Appendix A.

(*n*) *Re Webb*, 1897, 1 Ch. 144, approved, *Re Judd and Poland and Skelcher's Contract*, 1906, 1 Ch. 684, 690, 691.

(*o*) See note (*k*), above.

(*p*) *Cholmely v. Parton*, 3 Bing. 207, 5 Bing. 48; *S. C.* nom. *Cockrell v. Chalmers*, 10 B. & C. 564, 3 Russ. 365, 1 R. & M. 118, 1 Cl. & Fin. 60.

or to sell the surface reserving the mines and minerals thereunder (*q*). But under the Trustee Act, 1893 (*r*), replacing an Act of 1862 (*s*), the High Court may sanction the sale by a trustee, or other person authorized to sell land, of the land with an exception or reservation of any minerals, or of the minerals separately from the rest of the land, and in each case either with or without rights and powers of and incidental to the working, getting or carrying away of the minerals. And when such sanction has been once obtained, the trustee or other person may make such sales from time to time without any further application to the Court, unless forbidden by the instrument creating the trust or authority to sell (*t*). Trustees for sale of land should not agree to sell at a price to be fixed by valuation; for that would be a delegation of their discretion to decide what price they will accept (*u*). On these grounds it appears that they ought not to enter into a contract for sale containing the usual stipulations (*x*) as to taking timber at a valuation; but they should sell the whole property together at one price (*y*). The same reason-

Trustees
should not
sell at a
valuation.

(*q*) *Buckley v. Howell*, 29 Beav. 546. See 3 Davidson, Prec. Conv. 295, 3rd ed.; Dart, V. & P. 68, 1184, 5th ed.; 76, 1296, 6th ed.; 77, 1117, 1134, 7th ed.

(*r*) Stat. 56 & 57 Vict. c. 53, s. 44, amended by 57 & 58 Vict. c. 10, s. 4, and extending to dispositions by way of exchange, partition or enfranchisement by a trustee or other person authorized so to dispose of land.

(*s*) Stat. 25 & 26 Vict. c. 108.

(*t*) Stat. 56 & 57 Vict. c. 53, s. 44 (2), amended by 57 & 58 Vict. c. 10, s. 4.

(*u*) *Peters v. Lewis & East Grinstead Ry. Co.*, 16 Ch. D. 703, 713, 18 Ch. D. 429, 437; *Re Wilton's Settled Estates*, 1907, 1 Ch. 50, 55; 1 Dart, V. & P. 79, 5th ed.; 90, 6th ed.; 89, 7th ed.

(*x*) Above, pp. 60, 71.

(*y*) 1 Davidson, Prec. Conv. 522, 4th ed., 434, 5th ed. In *Re Llewellyn*, 37 Ch. D. 317, a tenant for life without impeachment of waste selling under the Settled Land Acts sold the settled land by auction with a stipulation that the purchaser should pay for the timber at a valuation to be made in the usual way. The vendor claimed to have the amount of this valuation paid to him. It was decided that he was not entitled to this. But no suggestion was made that the sale was invalid as an exercise of the statutory power on the ground that the price of the timber was to be ascertained by valuation. The remainderman was probably content with the result of the sale. But in *Re Wilton's Settled Estates*, 1907, 1 Ch. 50, 55, it

ing is applicable in the case of fixtures. But a stipulation on a sale by trustees that the purchaser shall pay a fixed sum for the timber or fixtures in addition to the price of the land does not appear to be objectionable; as that is, in effect, a sale of the whole property at one price settled by the trustees themselves (z). A trustee for sale is not entitled to enter into an agreement giving some person an option to purchase the property at a future time (a).

Option of purchase.

It must not be forgotten, in considering a title depending on the exercise by trustees of a trust for or power of sale, that the capacity to exercise the trust or power is not necessarily co-incident with the devolution of the legal estate. It is not every person succeeding to an estate given in trust who is competent to execute a discretionary trust or power connected therewith; on the contrary, the general rule is that such a trust or power can only be well executed by the persons whom the author of the trust has designated for the purpose, and in whom he has placed his confidence accordingly (b). Thus in every case in which such a trust or power is exercised by any other persons than those originally entrusted therewith, the question arises whether the persons who purport to act in exercise of the trust or power are expressly or impliedly authorized to execute the same. On this point the law is as follows:—

What persons, besides the original trustees, can exercise a trust for or power of sale.

was laid down that a tenant for life selling under the Settled Land Acts ought not to sell at a price to be fixed by somebody else.

(z) See *Cockerell v. Chaulmley*, 10 B. & C. 564, 571.

(a) *Clay v. Rufford*, 5 De G. & Sm. 768, 779, 780; *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236.

(b) *Crowe v. Dieken*, 4 Ves. 97; *Cole v. Wade*, 16 Ves. 27, 46, 47; *Re Crunden and Meade's Contract*, 1909, 1 Ch. 690, 695, 696; and see the cases cited below, pp. 273, 271, and *Re Rumney and Smith*, 1897, 2 Ch. 351, 356, 359, 360. It does not appear that this rule was intended to be impugned by the remarks of Farwell, J., in *Re Smith*, 1904, 1 Ch. 139, 142.

As to trusts or powers coupled with an interest.	First, with respect to discretionary trusts or powers coupled with an estate or interest, as where lands are vested in trustees in fee upon trust for or with power of sale. If several trustees be invested with such a trust or power, the same may be exercised by the survivors or survivor of them for the time being, unless a contrary intention should have been expressed in the instrument creating the trust (<i>c</i>). And if one or more of the trustees should disclaim, the trust or power may be exercised by the other trustees or trustee (<i>d</i>). Every new trustee duly appointed under the statutory power to appoint trustees—whether conferred by Lord Cranworth's Act (<i>e</i>), the Conveyancing Act of 1881 (<i>f</i>), or the Trustee Act, 1893 (<i>g</i>)—has the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee, and so can well exercise such a trust or power, after the estate has been properly vested in him. Any new trustee duly appointed under an express power has equal authority
Survivorship of the trust.	
Disclaimer.	
New trustees.	

(*c*) So enacted as to trusts constituted after or created by instruments coming into operation after the 31st Dec. 1881; stat. 56 & 57 Vict. c. 53, s. 22, replacing 44 & 45 Vict. c. 41, s. 38. But with respect to trusts or powers coupled with an interest, these enactments did no more than declare the previous law; Co. Litt. 113a; *Warburton v. Sandys*, 14 Sim. 622; *Watson v. Pearson*, 2 Ex. 581, 594; *Lane v. Debenham*, 11 Hare, 188; *Lewin on Trusts*, 230, 509, 510, 6th ed., 288, 738, 11th ed.; *Re Bacon*, 1907, 1 Ch. 475.

(*d*) Co. Litt. 113a; Jenk. Cent. 44; *Crewe v. Dicken*, 4 Ves. 97, 100; *Granville v. McNeile*, 7 Hare, 156. It is now settled that disclaimer of the estate, as well as of the office, of a trustee may be made by conduct only and need not be evidenced by matter of record or by deed; *Re Birchall*,

40 Ch. D. 436; *Lewin on Trusts*, 176, 177, 6th ed., 211, 212, 10th ed. It must not be forgotten that, where one is appointed executor and trustee of a will, refusal to act as executor, and even renunciation of probate, is not in itself a disclaimer of the trusteeship or of any estate in or power over land devised or given to the trustees of the will; but it may be evidence of such disclaimer; *Lewin on Trusts*, 220, 11th ed.; *Re Gordon*, 6 Ch. D. 531, 534. As to the effect of a disclaimer by all the trustees or the only trustee, see *Mallott v. Wilson*, 1903, 2 Ch. 494; below, p. 276, and nn. (*i*), (*k*).

(*e*) Stat. 23 & 24 Vict. c. 145, s. 27.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 31 (5).

(*g*) Stat. 56 & 57 Vict. c. 53, s. 10 (3).

in this respect (*h*). And the same authority is now conferred by statute upon every trustee appointed by a Court of competent jurisdiction (*i*). With respect to the exercise of such a trust or power as we are considering after the death of a sole or the last surviving trustee, the true principle appears to be that the same is exercisable by the persons who succeed to the legal estate after his death, if the author of the trust has either expressly or impliedly authorized such persons to execute the same; but otherwise not (*k*). Thus, where lands have been vested in A. and B. in fee in trust that they, A. and B. (naming them, but not mentioning their heirs or other legal representatives), shall sell the same, it does not appear that under the old law of the descent of trust estates (*l*) the heir (*m*), or according to the present law (*n*) the executors or administrators of the surviving trustee, could well execute the trust (*o*). According to the old conveyancing practice in force before the commencement of the Conveyancing Act of 1881 (*p*), it was usual, where real estate was vested in trustees in fee on trust for or with power of sale, to provide expressly that the trust or power should be

Trustees appointed by the Court.

Persons succeeding to the estate on the death of a sole or last surviving trustee.

(*h*) Such authority was expressly conferred in the old common form of power to appoint new trustees: but if not expressly conferred, it would be implied from the very fact that the creator of the trust expressly authorised the appointment of new trustees; Lewin on Trusts, 507, 6th ed.; 734, 11th ed.

(*i*) Stat. 56 & 57 Vict. c. 53, s. 37, replacing 44 & 45 Vict. c. 41, s. 33, and 23 & 24 Vict. c. 145, s. 27. Before the enactment last cited, new trustees appointed by the Court and not by virtue of an express power to appoint new trustees could not, as a general rule, exercise arbitrary or special discretionary powers conferred upon the original trustees, unless such powers

should have been expressly or impliedly extended to the trustees for the time being: *Fordyce v. Bridges*, 2 Ph. 497, 510; *Newman v. Warner*, 1 Sim. N. S. 457; *Bartley v. Bartley*, 3 Drew. 384; *Byam v. Byam*, 19 Beav. 58.

(*k*) Above, p. 271, and n. (*b*).

(*l*) Above, p. 219.

(*m*) *Mortimer v. Ireland*, 11 Jur. 721; Lewin on Trusts, 202, 6th ed.; 251, 11th ed.

(*n*) Above, p. 221.

(*o*) *Re Ingley and Bank, &c.*, 13 L. R. Ir. 326; *Re Crunden and Meux's Contract*, 1909, 1 Ch. 690. But distinguish the cases mentioned in note (*c*), p. 274, below.

(*p*) Stat. 44 & 45 Vict. c. 41, which came into operation after the 31st Dec. 1881; s. 1 (2).

Heir of sole
or surviving
trustee.

Devisee.

exercisable by the trustees originally appointed or the survivors or survivor of them, or the heirs of such survivor (*g*); and in such cases there was no doubt that the heir of the last surviving trustee could well execute the trust or power if he took the legal estate (*r*). But where lands were vested in trustees in fee on trust that they or the survivors or survivor of them or the heirs of such survivor should sell the same, and the surviving trustee devised the trust estate, it was held that the devisee, not being authorized by the creator of the trust to execute the trust for sale, could not make a good title on a sale of the lands (*s*). And in such a case, it may be noted, the heir could not execute the trust, for he had no estate in the land (*t*). Where lands were vested in trustees in fee in trust that they or the survivors or survivor of them or the heirs or assigns of such survivor should sell the same, it was held that the devisee of the last surviving trustee, being one of the persons expressly designated by the author of the trust, could well execute the trust for sale (*u*). It was held by Jessel, M. R., that where lands were devised to trustees and their heirs on trust for sale, it must be taken that the testator intended to annex the trust to the estate, and that the devisee of the surviving trustee could execute the trust for sale accordingly; and he considered that the preceding decision to the contrary (*x*) had been overruled (*y*). Subsequently, how-

(*g*) Davidson, Prec. Conv. vol. i. p. 333, 4th ed.; vol. iii. pp. 858, 1271, 3rd ed.; vol. iv. p. 32, and note, 3rd ed.

(*r*) See Lewin on Trusts, 202, 6th ed. So the heir of the last surviving trustee could sell under a limitation to trustees and their heirs on trust "for sale" or "to sell" or that the trustee for the time being should sell; *Re Morton and Hallett*, 15 Ch. D. 143, 145, 149; *Re Cunningham and Frayling*, 1891, 2 Ch. 567.

(*s*) *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & S. 475; *Stevens v. Austen*, 3 E. & E. 685.

(*t*) Lewin on Trusts, 202, 6th ed.; 251, 252, 11th ed.

(*u*) *Titley v. Wolstenholme*, 7 Beav. 425; *Hall v. May*, 3 K. & J. 585.

(*x*) *Cooke v. Crawford*, 13 Sim. 91.

(*y*) *Osborne to Rowlett*, 13 Ch. D. 774.

ever, Baggallay and James, L. JJ., stated that they were not prepared to concur in this view (z), and Stirling, J., declared that he would hesitate to force upon a purchaser a title depending on the case of *Cooke v. Crawford* not being good law (a), and Parker, J., has expressed his assent to these criticisms (b). It appears, therefore, that the decision of Jessel, M. R., in *Re Osborne to Rowlett* (c), in so far as it conflicts with the principle above stated (d), can no longer be regarded as good law. As we have seen (e), since the Conveyancing Act of 1881 (f) took effect, real estate of inheritance vested in a sole trustee devolves, notwithstanding any testamentary disposition, upon his legal personal representatives in like manner as if the same were a chattel real vested in them, and they are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. It appears, therefore, that the legal personal representatives of a sole or sole surviving trustee may now exercise such trusts or powers as we are discussing in all cases in which under the old law the estate would have descended to the heir, and the heir so taking the legal estate could have well executed the trust or power (g). But the authority of such legal personal representatives so to exercise the trusts or powers will cease upon the appointment duly made of new trustees in place of the deceased trustees, and thenceforward the new trustees will be the proper persons to execute the trust (h). Where lands have been devised to trustees in fee upon trust for sale, and

Personal representatives of sole or surviving trustee.

Failure of devise of legal estate to trustee.

(z) *Re Morton and Hallett*, 15 Ch. D. 143, 149, 150; and see *Re Ingleby and Boak*, 13 L. R. Ir. 326.

(a) *Re Rumney and Smith*, 1897, 2 Ch. 351, 357.

(b) *Re Crandall and Meur's Contract*, 1909, 1 Ch. 690.

(c) 13 Ch. D. 774.

(d) Pp. 273, 274.

(e) Above, p. 221.

(f) Stat. 44 & 45 Vict. c. 41, s. 30.

(g) See *Re Waidanis*, 1908, 1 Ch. 123; *Re Routledge's Trusts*, 1909, 1 Ch. 280; *Re Crandall and Meur's Contract*, 1909, 1 Ch. 690, 698, 699; above, p. 274, and note (r).

(h) *Re Routledge's Trusts*, 1909, 1 Ch. 280.

Question in case of a devise by a sole trustee under the present law.

the devise of the legal estate has failed by reason of the trustees' death in the testator's lifetime, or of their disclaimer, then, if the testator died before the commencement of the Land Transfer Act, 1897, his heir, and otherwise his personal representatives, would take the legal estate subject to the trusts declared by the will (*i*), but could not well execute the trust for sale (*k*); although in the latter case the personal representatives could, of course, exercise the power of sale given to them by the last-mentioned Act (*l*). It should be noted that a difficulty may arise as to the persons who are authorized to exercise a trust for or power of sale, where lands vested in a sole trustee in fee upon such a trust or with such a power have been devised by him (under the present law) to other persons than his executors. The Conveyancing Act of 1881 (*m*) does not expressly take away the power of devising real estate held in trust: it merely provides that, notwithstanding any testamentary disposition, the same shall vest on the trustee's death in his legal personal representatives *in like manner as if the same were a chattel real vesting in them*. Now, when a man dies possessed of a chattel real, it vests at first in his legal personal representatives by virtue of their office, notwithstanding that he may have bequeathed it specifically; but on their assent to the bequest the legal estate therein passes at once to the specific legatee without any further conveyance (*n*). And if a man be possessed of a chattel real upon trust, he may nevertheless devise his estate therein to other persons than his executors (*o*). And should he do so, it does not appear

(*i*) *Pitt v. Pelham*, Freem. Ch. 134; *Sonley v. Clockmakers' Co.*, 1 Bro. C. C. 81.

(*k*) *Robson v. Flight*, 4 De G. J. & S. 608, 613; Farwell on Powers, 460, 2nd ed.

(*l*) Above, p. 233.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 30.

(*n*) Above, p. 218.

(*o*) See Stat. 7 Will IV. & 1 Vict. c. 26, s. 3; Lewin on Trusts, 198, 6th ed.

that his executors could disregard the specific devise and execute the trusts themselves, although the chattel has vested in them in the first instance by virtue of their office, and they would, but for the specific devise, be the proper persons to execute the trust. Thus, where leaseholds had been conveyed to two trustees, *their executors or administrators* (without further words), upon certain trusts, and the survivor of the two trustees devised all estates vested in him on any trust to A. and B. upon the same trusts on which he held the same, and appointed A., B. and C. his executors, it was held that neither the devisees of the trust estate nor the executors could exercise the trusts; and that since by the bequest the testator had taken the legal estate from those persons who ought otherwise to have been the trustees, the appointment of new trustees was necessary (*p*). It seems, therefore, that where real estate of inheritance vested in a sole trustee for sale or with power of sale has been devised by him to other persons than his executors, then, if under the old law the trust or powers could not have been well executed by his devisee, a purchaser could not safely accept the title under a purported exercise of the trust or power either by the executors alone or by the executors and devisees together. And if the terms of the trust should have authorized the assigns of the trustees to exercise the trust or power, still a purchaser could scarcely be advised to accept a title under a purported exercise of the trust or power by the devisees in conjunction with the executors; for as the latter are to be deemed in law the deceased trustee's heirs *and assigns* within the meaning of all trusts and powers, it would be doubtful to what persons the purchase money should be paid. In either case, therefore, the only safe course would seem to be to require the appointment of new trustees.

(*p*) *Re Burt*, 1 Drew. 319.

Power
without an
interest.

Survivorship
of powers
given to
trustees.

Survivorship
of bare
powers.

General rule.

Powers given
to executors.

In the case of a power of sale given to trustees without any estate in the land, such as the power of sale usually inserted in settlements of land before the Settled Land Act, 1882, took effect, the rule is even more strict that the same can only be well exercised by the persons designated for this purpose by the donor of the power (*q*). It is now provided (*r*), with respect to executorships and trusts constituted after or created by instruments coming into operation after the year 1881, that a power given to two or more executors or trustees jointly may be exercised by the survivors or survivor of them for the time being, unless the contrary were expressed in the instrument creating the power. Independently of this enactment, the law respecting the survivorship of bare powers appears to be as follows:—

I. The general rule is that, when a bare power is given to two or more persons, after the death of any one of them, it cannot be exercised by the survivor or survivors (*s*).

II. When a bare power was given to two or more executors, words might be used, which showed an intention that the power should be annexed to the office of executor; and, in such a case, after the death of any one of them, the survivor or survivors were capable of exercising the power (*t*). When therefore, a man by will gave a power to his executors, designating them as such without naming them (*u*), or designating them "his executors hereinafter named" (*x*), it was held that the power was annexed to the office of executor

(*q*) *Townsend v. Wilson*, 1 B. & A. 608.

(*r*) Stat. 56 & 57 Vict. c. 53, s. 22, apparently extended to executors by s. 50, and replacing 44 & 45 Vict. c. 41, s. 38.

(*s*) Co. Litt. 112b, 113a; Sug. Pow. 126, 128; *Montefiore v. Brown*, 7 H. L. C. 241.

(*t*) *Brassey v. Chalmers*, 16 Beav.

233; 4 De G. M. & G. 528; Sug. Pow. 128; *Crawford v. Forshaw*, 1891, 2 Ch. 261.

(*u*) Jenk. Cent. 43, case 83.

(*x*) *Brassey v. Chalmers*, 4 De G. M. & G. 528, following *Houell v. Barnes*, Cro. Car. 382; *Crawford v. Forshaw*, 1891, 2 Ch. 261; *contra*, *Luck v. Loggin*, 1 And. 145.

and might be exercised even by a sole surviving executor. Supposing that a man gave by will a mere power to two or more persons, designating them by their names, without any reference to the office of executor, and in a subsequent part of the will appointed the same persons executors: it would be an exceedingly nice question, to be determined by a consideration of the purposes for which the power was given, whether an intention were shown to annex the power to the office of executor, sufficient to take the case out of the general rule (*y*).

III. Powers of executors, which arose by implication of law, were annexed to the office, and might be exercised after the death of any executor, by the surviving executors for the time being or by a sole surviving executor (*z*).

Powers arising by implication of law.

IV. If a bare power were given to two or more trustees, and the words used in the instrument creating the trust showed that the power was intended to be annexed to the office of trustee and not to be conferred upon the donees as individuals, it appears that, after the death of one, the survivor or survivors could execute the power (*a*). But if no such intention appeared, the case fell within the general rule (*b*).

Powers given to trustees.

V. It is said that, if a power be given to three or more persons, by a class designation and not by their names, for instance, "to my trustees," "to my sons," after the death of any of them, the authority will

Powers given to a class.

(*y*) See Sug. Pow. 127, 128; Jenk. Cent. 43, case 83; Hargrave's note (2) to Co. Litt. 113a; *Crawford v. Forshaw*, 1891, 2 Ch. 261, 266-269.

(*z*) Dyer, 371b, case 3; *Fayles v. Peacock*, 11 M. & W. 630, 639; Sug. Pow. 128.

(*a*) Romilly, M. R., *Byam v. Byam*, 19 Beav. 58, in which case

the decision was that a power given to "the undersigned trustees" could, under the old law, be exercised by trustees appointed by the Court; see above, p. 273, n. (i); *Re Smith*, 1904, 1 Ch. 139.

(*b*) *Townsend v. Wilson*, 1 B. & A. 608; see *Hall v. Dewes*, Jac. 189; *Re Bacon*, 1907, 1 Ch. 475, 478.

survive so long as the plural number remains (*c*). This is a doubtful proposition (*d*). It is submitted that if a man gave a power to his "trustees" without designating them by name, the case would have fallen within the preceding proposition (*e*).

Release and disclaimer of powers.

Under the Conveyancing Act of 1881 (*f*), a person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power. And under the Conveyancing Act, 1882 (*g*), any power, whether coupled with an interest or not, may be disclaimed by deed, after which the disclaiming party shall not be capable of exercising or joining in the exercise of the power; but the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power was given, unless the contrary were expressed in the instrument creating the power. With respect to powers coupled with an interest, these enactments did no more than declare the previous law (*h*). But a power simply collateral could not formerly be extinguished or suspended by release or any other means (*i*).

(*c*) Sug. Pow. 128; *Lee v. Vincent*, Cro. Eliz. 26; Co. Litt. 113a.

(*d*) See *Sykes v. Sheard*, C. A., 2 De G. J. & S. 6, disapproved by Malins, V.-C., *Jefferys v. Marshall*, 19 W. R. 95; Farwell on Powers, 456, 2nd ed.

(*e*) See *Re Smith*, 1904, 1 Ch. 139.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 52 (1), applying (by sub-s. 2) to powers created either before or after the commencement of the Act.

(*g*) Stat. 45 & 46 Vict. c. 39, s. 6 (1, 2), applying (by sub-s. 3) to powers created either before or after the commencement of the Act.

(*h*) The donee of any power

other than a power simply collateral might always release or contract not to exercise it: Sug. Pcw. 82 sq.; *West v. Berney*, 1 R. & M. 431; *Smith v. Death*, 5 Madd. 371; *Horner v. Swann*, T. & R. 430; *Hurst v. Hurst*, 16 Beav. 372; *Isaac v. Hughes*, L. R. 9 Eq. 191. And if a power coupled with an estate or interest were given to any person, he might disclaim the estate and thus render himself incapable of exercising the power: Sug. Pow. 50; *Hawkins v. Kemp*, 3 East. 410, 437; *Nicloson v. Wordsworth*, 2 Sw. 365, 369, 370; *Adams v. Taunton*, 5 Madd. 435.

(*i*) Sug. Pow. 49, 893; *West v. Berney*, 1 R. & M. 431, 434. A power simply collateral is a

And it appears that the disclaimer of a bare power was formerly ineffectual (*k*). And where a bare power had been given to two or more persons and one of them had affected to disclaim the power, the power could not, as a rule, be well exercised by the other or others of them (*l*). But in the case of a power given by will to the testator's executors to sell his lands, if any of the executors refused to take administration of the will, the accepting executors or executor might by statute (*m*) exercise the power alone. And where a power was annexed to the office of executor, either by implication of law or by the testator's direction (*n*), an executor who renounced probate could not exercise the power (*o*); but the executors or executor who proved might well do so (*p*). If trustees were invested with any power which it would be their duty to exercise, they could not release or contract not to exercise the same or otherwise divest themselves of their authority (*q*); and the above enactments have not altered the law in this respect (*r*).

Release of a bare power by a breach of trust.

The law as to the exercise by any new trustee duly appointed of a bare power given to any trustee or trustees is the same as governs the exercise by a new trustee of a power coupled with an interest (*s*). With respect to the exercise by any other person than a new trustee duly appointed of a bare power given to a

Exercise of a bare power by new trustees.

By any others after the death of the original donees.

power by the exercise of which the donee can acquire no interest in the subject-matter of the power, given to a person who has not any interest therein at the time of the creation of the power and takes no interest therein under the instrument conferring the power; see Sug. Pow. 47, 48.

(*k*) Sug. Pow. 50.

(*l*) Sug. Pow. 50, 126; see above, pp. 278-280.

(*m*) Stat. 21 Hen. VIII. c. 4.

(*n*) Above, p. 279.

(*o*) *Keates v. Burton*, 14 Ves. 434; *A.-G. v. Fletcher*, 5 L. J. (N. S.) Ch. 75; see Farwell on Powers, 95-98, 2nd ed.

(*p*) *Crauford v. Forshaw*, 1891, 2 Ch. 261, 266, 267.

(*q*) *Weller v. Ker*, L. R. 1 Sc. App. 11; *Re Dunne's Trusts*, 1 L. R. Ir. 516; *Saul v. Pattinson*, 34 W. R. 561.

(*r*) *Re Eyre*, 49 L. T. N. S. 259.

(*s*) Above, p. 272; see *Hall v. Deves*, Jac. 189.

trustee or trustees after the death of a sole or the last surviving trustee, there is, of course, no succession to any estate in the land, and the power can only be exercised, if at all, by some person expressly designated for the purpose by the donor of the power, as where the executors or administrators of the last surviving trustee are mentioned among the persons to whom the power is given (*t*).

Trustees exercising a power conferred by a settlement for some purpose provided for in the Settled Land Acts.

In the case of a purchase from trustees exercising a power of sale, the conveyancer advising the purchaser must have regard to the provisions of the Settled Land Act, 1882 (*u*), which make the consent of the tenant for life under a settlement necessary to the exercise by the trustees of the settlement or any other person of any power conferred by the settlement and exercisable for any purpose provided for in the Act. He must consider, therefore, whether the instrument conferring the power is, either alone or together with other instruments, a settlement within the meaning of the Act (*x*). And if it be, he should require the limitations of the beneficial interests under the settlement to be abstracted (if this has not been done) sufficiently to show whether there is a tenant for life, or a person having the powers of a tenant for life, entitled in possession under the settle-

(*t*) See above, pp. 278-280; Farwell on Powers, 453, 454, 2nd ed.

(*u*) Stat. 45 & 46 Vict. c. 38, s. 56, sub-s. 2, enacting that in case of a conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the

trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

(*x*) See stats. 45 & 46 Vict. c. 38, s. 2; 53 & 54 Vict. c. 69, s. 4; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275; *Talbot v. Searisbrick*, 1908, 1 Ch. 812, 819, deciding that a private Act of Parliament, which simply conferred powers upon the trustees of a settled estate, but did not alter or affect the limitations of the property, was not one of the instruments constituting the settlement; and see next chapter.

ment (*y*). And if the existence of any such person be disclosed, the conveyancer should require him to consent to the exercise of the power; for if such consent should not be obtained, any conveyance to him by the trustees in supposed pursuance of the authority conferred by the settlement would be void as an exercise of the power (*z*).

It will be observed that the only powers, to the exercise of which the consent of the tenant for life is so required, are those conferred by the settlement and exercisable for any purpose provided for in the Act. It must not be forgotten that in this context the expression "the settlement" means the settlement as defined in the Act, and therefore extends to any group of instruments forming what is termed a compound settlement (*a*). The purposes provided for in the Act are, of course, principally the sale of settled land and the application of the purchase-money in manner therein provided, the exchange and partition of settled land and the leasing thereof for the terms specified in the Act (*b*); and any express powers conferred by the settlement for any of these purposes, upon any person or persons other than the tenant for life, are exercisable only with his consent. If, however, the settlor should have given to trustees larger powers over the settled land than are by the Act conferred upon the tenant for life, as if he should have authorized them to sell in consideration of the receipt of debentures of or shares in a company, or of the grant of a rentcharge, or to lease for longer terms than may be granted under the Act, these powers are perfectly valid (*c*); and it does not appear that they would be

(*y*) See stat. 45 & 46 Vict. c. 38, ss. 2 (5), (7), 58.

(*z*) See *Re Newcastle's Estates*, 24 Ch. D. 129, 139 *sq.*; *Re Clithorne Estate*, 28 Ch. 378; 31 Ch. D. 135; *Re Atherton*, 1891, W. N. 85.

(*a*) See note (*x*), above.

(*b*) See stat. 45 & 46 Vict. c. 38, ss. 3, 6, 21.

(*c*) Stat. 45 & 46 Vict. c. 38, ss. 56, 1; 57; *Lonsdale v. Louthers*, 1900, 2 Ch. 687.

“exercisable for any purpose provided for in this Act” (*d*), so as to make the consent of the tenant for life necessary to their exercise (*e*). It has been suggested (*f*) that to the exercise of a power given to trustees for raising charges by mortgage or sale the consent of the tenant for life would not be necessary, on the ground that the trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges. But with regard to a power conferred by the settlement to raise charges by sale, it must be remembered that the Settled Land Act, 1882 (*g*), authorizes the application of the proceeds of a sale of the settled land by the tenant for life under the power thereby conferred in the discharge of any incumbrances affecting the inheritance of the settled land or other the whole estate, which is the subject of the settlement. So that if the charges to be raised should come within the definition of such incumbrances, their raising by sale would appear to be a purpose provided for in the Act; and it is thought that in such case it would not be safe to rely on an exercise of the express power of sale without the tenant-for-life’s consent. As regards a power for trustees to raise charges by mortgage, prior to the Settled Land Act, 1890, a tenant for life had no general power to mortgage the settled land in order to raise money to dis-

(*d*) See sect. 56 (2), above, p. 282. and n. (*u*).

(*e*) This statement assumes that by the exercise of the express power something will be done which the tenant for life could not do under his statutory power. But if by the exercise of a larger power than that conferred by the Act it were proposed to do something which could be done under the statutory power, as if under a power for trustees to grant building leases for any term not

exceeding 120 years it were proposed to grant a building lease for 99 years on the same conditions as are authorized by the statutory power, the case is different: and the consent of the tenant for life would appear to be necessary.

(*f*) Wolstenholme’s Conveyancing and Settled Land Acts, 387, 8th ed.

(*g*) Stat. 45 & 46 Vict. c. 38, s. 21 (ii).

charge some incumbrance affecting the same; so that raising charges by mortgage was not a purpose provided for by the Settled Land Act, 1882. The Act of 1890 (*h*), however, empowered the tenant for life to mortgage the settled land for the purpose of raising money to discharge an incumbrance thereon. And as this Act and the previous Settled Land Acts are to be read and construed together as one Act (*i*), it seems that the raising of money by mortgage to discharge incumbrances is now a purpose provided for in the Acts, and consequently that an express power for this purpose conferred on trustees by the settlement is no longer well exercisable without the consent of the tenant for life. Where the settlement contains, not a mere discretionary power, but an imperative trust exercisable for some purpose provided for in the Act, it appears that the consent of the tenant for life to the exercise of the trust is not required (*k*).

By the Settled Land Act, 1884 (*l*), where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act, 1882, then, notwithstanding anything contained in the above-cited provisions (*m*) of that Act requiring the consent of all those persons, the consent of only one of those persons is to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement and exercisable for any purpose provided for in that Act. By the Act of 1882 (*n*), if in any case there are two or more persons beneficially entitled to possession of settled land as tenants in common, or as joint tenants, or for other

Where two or more persons together constitute the tenant for life.

(*h*) Stat. 53 & 54 Vict. c. 69, s. 11.

(*i*) Sect. 2.

(*k*) See *Taylor v. Pearce*, 25 Ch. D. 646.

(*l*) Stat. 47 & 48 Vict. c. 18, s. 6 (2).

(*m*) Stat. 45 & 46 Vict. c. 38, s. 56 (2); above, p. 282, n. (*n*).

(*n*) Sect. 2 (*5*, (*6*)).

concurrent estates or interests, they together constitute the tenant for life for the purposes of that Act. In any such case, therefore, one only of such persons need now consent to the exercise by the trustees of the settlement, or any other person, of any power conferred by the settlement and exercisable for any purpose provided for in that Act. Where lands were given for the benefit of several persons in undivided shares, and some of the shares were given in fee and others limited to a donee for life with remainder over, and a power was given for trustees to sell the entirety of the premises, it was questionable whether the consent of the tenants for life of the settled shares was necessary to the exercise by the trustees of their power of sale over the entirety. For the power of sale conferred by the Settled Land Acts would embrace the settled shares only, and it was only as regards these shares that the land would be the subject of a settlement within the meaning of those Acts; so that the power to sell the entirety might be considered to be not a power conferred by the settlement and exercisable for a purpose provided for in the Acts, but a power altogether paramount to the settlement. But in a case (o) where a testator gave one-fifth part of his estate to each of his four daughters for life with remainder over, and gave the remaining fifth part to the children of a deceased daughter absolutely, and empowered trustees to sell the whole of his estate, Kekewich, J., held that there was a conflict between this express power of sale and the power of sale given by the Settled Land Acts, because the sale of the entirety would deprive the tenants for life of the settled shares of their statutory power to sell them; and that the consent of the tenants for life was therefore necessary to the exercise by the trustees of their express power of sale. And he further decided

(o) *Re Osborne and Bright's, Ltd.*, 1902, 1 Ch. 335.

that the tenants for life of the four settled shares did not together constitute a tenant for life within the meaning of the Settled Land Act, 1882 (*p*), so as to enable the required consent to be given under the Act of 1884 (*q*) by one only of them.

It must not be forgotten that, when land is settled either by deed or will on trust for sale and investment of the purchase-money for the benefit of various persons in succession, and the lands are not immediately sold, estate duty will become payable on the death of any one of those persons, and will, it appears, become a charge on the land. On a purchase, therefore, from the trustees for sale under such a settlement, the purchaser, if he have notice of the death on or after the 1st August, 1894, of any person so interested in the purchase-money, must see that all estate duty, which has become so charged on the land sold, has been or shall be paid (*r*).

Estate duty chargeable on land settled on trust for sale.

If trust money be improperly invested in the purchase of land, it is the duty of the trustee to realise the investment at the earliest favourable opportunity, and invest the proceeds in some manner authorized by the instrument which created the trust. The trustee is therefore empowered to sell the land, and can make a good title thereto and convey the same without the concurrence of the beneficiaries, notwithstanding that the purchaser have notice of the breach of trust; unless the beneficiaries, being all *sui juris*, have elected to take the land *in specie* (*s*).

Sale of land purchased in breach of trust.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 2 (5), (6).

(*q*) Stat. 47 & 48 Vict. c. 18, s. 6 (2).

(*r*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2, 9 (1), 24; see the chapter on the Death Duties in the second volume.

(*s*) *Re Patten and Edmonton Union*, 32 L. J. Ch. 787; *Pawer v. Banks*, 1901, 2 Ch. 487, 496; *Re Jenkins and Randall's Contract*, 1903, 2 Ch. 362; see above, p. 260; Dart, V. & P. 610-612, 5th ed.; 687-689, 6th ed.; 629-630, 7th ed.

Trustees'
receipts.

Modern statutes have in effect abolished the old rule of equity, that any person paying money or assigning other personal estate to a trustee thereof was bound to see that the same was duly applied pursuant to the trust, unless exempted from that obligation by the intention of the author of the trust, either expressly declared or implied from the nature of the trusts (*t*). Under the Trustee Act, 1893 (*u*), the receipt in writing of any trustee for any money, securities or other property or effects, payable, transferable or deliverable to him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof. It may be noted that this enactment does not justify the payment of money or delivery of securities to one only of several trustees. In such a case the money must be paid or other property assigned over to all the trustees, who should all join in giving the receipt (*x*).

Purchase by
trustees.

According to the general rule of equity, trustees investing trust money in the purchase of lands were

(*t*) *Lloyd v. Baldwin*, 1 Ves. sen. 173; Sug. V. & P. 657 *sq.*; Lewin on Trusts, 394 *sq.*, 6th ed.; 530 *sq.*, 11th ed.

(*u*) Stat. 56 & 57 Vict. c. 53, s. 20, replacing 44 & 45 Vict. c. 41, s. 36, and applying to trusts created either before or after the commencement of the Act. Also by stat. 22 & 23 Vict. c. 23, the receipt of a trustee for any purchase or mortgage money payable to him is a good discharge, unless a contrary intention be expressly declared by the instrument creating the trust. Lord Cranworth's Act, stat. 23 & 24 Vict. c. 145, s. 29, provided that trustees' receipts should be good discharges for any money

payable to them: but this provision applied only in the case of instruments executed on or after the 28th Aug. 1860, and was repealed by stat. 44 & 45 Vict. c. 41, s. 71. After the passing of Lord Cranworth's Act, however, the old practice of inserting in every instrument creating a trust a receipt clause, in terms similar to those of the present statutory provision, was discontinued; 3 Davidson, Prec. Conv. 222-226, 719, n., 3rd ed.

(*x*) *Hall v. Franck*, 11 Beav. 519; *Webb v. Ledsam*, 1 K. & J. 385; *Margetts v. Perks*, 12 W. R. 517; *Lee v. Sankey*, L. R. 15 Eq. 204; 3 Davidson, Prec. Conv. 223, n., 3rd ed.

bound to see that they obtained a good marketable title (*y*). This rule, however, was not inflexible; it might be modified in its application according to the circumstances of particular cases. Thus if, considering the objects of the trust (such as the acquisition of land advantageous or convenient to be held with land already in settlement), the purchase were otherwise desirable, it appears that trustees would be justified in accepting a substantially safe holding title (*z*). And the rule has now been considerably relaxed by statute. Trustees purchasing land are expressly authorized to buy without excluding the application of the second section of the Vendor and Purchaser Act, 1874 (*a*). This exonerates trustees authorized to invest in the purchase of leasehold lands, held for a term of which less than forty years are unexpired, from the necessity of stipulating for the production of the lessor's title (*b*).^{*} Trustees are also specially protected in buying under the conditions imported into contracts for sale by the Conveyancing Act of 1881 (*c*), when the period, for which title is by law required to be shown, is not curtailed by special stipulation. And it is now provided by the Trustee Act, 1893 (*d*), that a trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion

(*y*) Lewin on Trusts, 437, 6th ed.; 579, 11th ed.; *Dance v. Goldingham*, L. R. 8 Ch. 902, 911.

(*z*) 1 Dart. V. & P. 89, 90, 5th ed.; 99, 100, 6th ed.; 97, 98, 7th ed.

(*a*) Stat. 36 & 37 Vict. c. 53, s. 15, replacing 37 & 38 Vict. c. 78, s. 3; see above, pp. 42, 99, 192. Trustees purchasing need not, of course, exclude the operation of the first section of the Vendor and Purchaser Act, 1874:

for that section altered the rule of law, and made a forty years' title an equally good marketable title as a sixty years' title was previously; see above, pp. 98, 192.

(*b*) See above, pp. 96, 99.

(*c*) Stat. 44 & 45 Vict. c. 41, s. 66; see above, pp. 42, 45, 99.

(*d*) Stat. 56 & 57 Vict. c. 53, s. 8 (3), replacing 51 & 52 Vict. c. 59, s. 4 (3).

of the Court the title accepted be such as a person acting with prudence and caution would have accepted. The standard so set is that to which trustees are now obliged to conform (*e*); and they should be careful, in buying lands with trust money, not to bind themselves by any condition of sale which will preclude them from requiring such a title as they ought to obtain. Trustees directed or empowered to purchase lands are frequently authorized by the express terms of the instrument creating the trust to purchase any hereditaments with less than a marketable title; but this scarcely allows them to adopt a lower standard than that now set by the Trustee Act, 1893 (*f*).

What kind of property should be bought by trustees for persons entitled successively.

Trustees authorized to purchase land to be held on trust for persons entitled in succession, as tenant for life and remainderman in fee, should take care that the property they buy is of a nature to confer upon all the persons so entitled their due share of the benefit to be derived from the purchase. Generally speaking, they should seek to obtain a property which will produce a fair immediate return in the way of income to the

(*e*) See *Re Theobald*, 19 Times L. R. 536.

(*f*) See Davidson, *Prec. Conv.* vol. iii. 250, 722, 3rd ed.; vol. iv. 55, 3rd ed.; 1 Dart, V. & P. 90, 5th ed.; 100, 6th ed.; 98, 7th ed.; 2 Key & Elph. *Prec. Conv.* 537, 4th ed.; 528, 8th ed. It may be mentioned here that trustees investing trust money on a mortgage of lands were bound equally as on a purchase to invest on the security of property with a good marketable title; and there were not the same reasons in the case of an investment on mortgage for relaxing the stringency of the rule. It has long been the regular conveyancing practice expressly to authorize trustees to dispense with the in-

vestigation of the lessor's title in lending money on the security of leasehold hereditaments or otherwise to lend on any security with less than a marketable title; see the authorities last cited. And now the above-quoted enactment (sect. 8 (3) of the Trustee Act, 1893) applies equally in the case of trustees lending money on the security of any property as in that of a purchase; and by sect. 8 (2) of the same Act a trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed wholly or partially with the production or investigation of the lessor's title.

tenant for life, and is likely to continue to yield the same advantage to the remainderman after his death. They should avoid alike property which is wasting, or may be wasted, such as mines or timber, and property yielding no present profits, as a reversion or remainder to which no rent is incident, or an advowson (*g*). Even house property has been thought to be objectionable for purchase by trustees on the ground of its being liable to decay for want of repair and to destruction by fire (*h*). It has been held, however, that trustees authorized to invest in the purchase of "lands or hereditaments of an estate in fee simple in possession" were entitled to buy lands subject to building leases for ninety-nine years (*i*). Each case must, of course, be considered with reference to the terms and object of the power given to purchase. Thus, where it is intended that a large estate shall be purchased and conveyed to the usual limitations of a strict settlement, it is certainly allowable to buy lands bearing a fair proportion of timber (*k*); and at the present time it seems equally permissible to purchase land containing mines and minerals, so long as the mineral wealth does not form too large a part of the value of the property, since the mines can be worked and the profits equitably distributed between tenant for life and remainderman under the powers given by the Settled Land Act, 1882 (*l*).

Trustees selling land under a trust for or power of sale should, as a rule, obtain a valuation of the property from a competent professional surveyor acting for them independently and in no wise concerned on behalf of any

Valuation on behalf of trustees selling or purchasing.

(*g*) Lewin on Trusts, 438, 439, 6th ed.; 582, 583, 11th ed.

h Lewin on Trusts, 438, 6th ed.; 582, 11th ed.

(*i*) *Re Peyton's Settlement Trust*, L. R. 7 Eq. 463; and see *Re Theobald*, 19 Times L. R. 536.

(*k*) Lewin on Trusts, 439, 6th ed.; 582, 11th ed.

l Stat. 45 & 46 Viet. c. 38, ss. 6, 9-11. See *Bellot v. Littler*, W. N. 1874, p. 156; 22 W. R. 836; 30 L. T. N. S. 861.

purchaser, in order to guide them as to the sum to be accepted on a sale by private contract or to be fixed as the reserve price on a sale by auction. And trustees intending to purchase land should obtain similar advice with regard to the value of the land they propose to buy (*m*). But, of course, cases may occur in which trustees are practically safe in acting on their own judgment, as where obviously favourable terms are proposed to them. If all the *cestui-que-trusts* should be *sui juris*, and not too numerous, the best plan is to obtain their sanction as to the price to be taken, paid or fixed. Where a title depends on the exercise in the past of a trust for or power of sale or purchase of land, the purchaser may assume, if nothing appear to the contrary, that the trust or power was duly exercised to the best advantage of the *cestui-que-trusts* as regards price or value and otherwise; and he need not and should not make any inquiry or ask for any evidence as to this (*n*). But if it appear that the property was sold at an undervalue, or the trust or power was otherwise improperly exercised, the case is different and the title cannot safely be accepted (*o*).

(*m*) Lewin on Trusts, 375, 376, 436, 6th ed.; 495, 578, 11th ed.; 1 Dart, V. & P. 79, 5th ed.; 90, 6th ed.; 89, 7th ed.; above, p. 263. As to the valuation which ought to be obtained by trustees proposing to invest trust money on a mortgage of lands, see stat. 56 & 57 Vict. c. 53, s. 8.

(*n*) See *Borell v. Dann*, 2 Harc. 440, 449-452; *Ware v. Egmont*, 4 De G. M. & G. 460, 471-474; *Hurrell v. Littlejohn*, 1904, 1 Ch. 689; above, p. 117.

(*o*) See *A.-G. v. Pargeter*, 6 Beav. 150; *Ker v. Dungannon*, 1 Dru. & War. 509, 542; *Stevens v. Austen*, 3 E. & E. 685.

CHAPTER IX.

OF TITLE UNDER THE EXERCISE OF POWERS.

WHERE the title depends on the exercise of a power of appointment, it is the duty of the conveyancer advising the purchaser to ascertain that the power has been or will be in all respects well executed. The general rule is that in the exercise of a power *all* conditions prescribed in the instrument creating the power must be strictly observed; and in this respect no distinction is made between matters apparently substantial, such as the nature of the instrument by which the power is to be executed or the requirement of the consent of any person to its execution, and formalities like the number of witnesses by which the executing instrument is required to be attested (*a*). And the rule is that any instrument showing an intention to exercise the power, but not exactly complying with the terms and conditions imposed by the donor of the power, is void altogether as an exercise of the power (*b*).

Title depend-
ing on
exercise of
a power of
appointment.

(*a*) *Hawkins v. Kemp*, 3 East, 410, 440; *Holmes v. Coghill*, 7 Ves. 499, 506; *Reed v. Shergold*, 10 Ves. 370; *Marjoribanks v. Hovenden*, 1 Drury, 11; Sug. Pow. 206 *sq.*, 8th ed.; Farwell on Powers, 128 *sq.*, 2nd ed.; Wms. Real Prop. 384 *sq.*, 21st ed.

(*b*) See previous note; *Barretto v. Young*, 1900, 2 Ch. 339. This rule is modified in equity, though not at law, by the equitable doctrines mentioned below as to aiding the defective execution of powers; and is further modified

in the case of powers of leasing by the Leases Acts, 1849 and 1850 (stats. 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17), under which an attempted exercise of a power of leasing, which is invalid at law for want of strict compliance with the terms of the power, may be considered in equity as a contract for the grant of a valid lease under the power, and leases prematurely granted in exercise of a power are made valid if the lessor's estate endure until the time when the lease might have

Under the Wills Act (c), however, wills executing powers *must* be executed and attested by two witnesses in the manner therein prescribed for the execution of all wills (d); but if so executed and attested, they operate as valid executions of the power, notwithstanding that the instrument creating the power may have required some additional or other form of execution or solemnity.

been well granted: Wms. Real Prop. 392, 393, 21st ed.

(c) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 10.

(d) This rule must be strictly observed in the case of all wills exercising powers to dispose of land in England, leasehold as well as freehold or copyhold, whether the testator were domiciled in England or elsewhere; see *Murray v. Champemoune*, 1901, 2 Ir. 230; *Pepin v. Brugère*, 1902, 1 Ch. 24; and also in the case of all wills exercising an English power to dispose of personal chattels, and made in England by persons domiciled in England (whether British subjects or aliens). By an English power is meant one created by an instrument intended to be construed according to English law and to confer a power exercisable according to the rules of English law. Wills exercising English powers to dispose of personal chattels are valid, as an exercise of the power, if executed in accordance with the requirements of the Wills Act, whatever be the testator's domicile and although (where he is domiciled out of England) the will is invalid by the law of the place of his domicile; *Murphy v. Deichler*, 1903, A. C. 446. But wills made by persons domiciled out of England (whether aliens or British subjects), exercising powers to dispose of personal chattels, complying with the formalities (if any) required by the terms of the power, and otherwise executed in accordance with the law of the

place of the testator's domicile are valid, as an exercise of the power, although they do not comply with the requirements of the Wills Act; *D'Haart v. Harkness*, 34 Beav. 324; *Re Price*, 1900, 1 Ch. 442; *Barretto v. Young*, 1900, 2 Ch. 339; *Re Walker*, 1908, 1 Ch. 560. Cf. and distinguish *Re D'Este's Settlement Trusts*, 1903, 1 Ch. 898; *Re Scholefield*, 1905, 1 Ch. 408, settled, 1907, 1 Ch. 664. As to the wills of British subjects exercising a power over personal chattels and not complying with the Wills Act but admissible to probate as wills solely by virtue of Lord Kingsdown's Act (stat. 24 & 25 Vict. c. 114, s. 1), see *Re Kirwan's Trusts*, 25 Ch. D. 373; *Hummel v. Hummel*, 1898, 1 Ch. 642; *Re Price*, 1900, 1 Ch. 442, 448-450; Dicey, Conflict of Laws, 691-696, 821 sq., 2nd ed. It has been decided in Ireland that a power to dispose of the proceeds of sale of land settled on trust for sale is for the purposes of the doctrine here discussed a power to dispose of land; *Murray v. Champemoune*, ubi sup. But it seems questionable whether this is correct, as an interest in the proceeds of sale of land settled on trust for sale is for all other purposes treated in English law as personalty; see *Forbes v. Steven*, L. R. 10 Eq. 178; *A.-G. v. Hubbuck*, 13 Q. B. D. 275; *A.-G. v. Johnson*, 1907, 2 K. B. 885. The same remark is applicable to a beneficial interest in a definite sum of money directed to be raised out of land, such as a portion.

And under Lord St. Leonards' Act (*e*) powers of appointment, exercisable by deed or by any instrument in writing not testamentary, may be well exercised, subsequently to the Act, by a deed executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, although the instrument creating the power may have required some additional or other form of execution or attestation, or solemnity. It will be observed that, where a power is required to be executed by a deed or writing attested by two witnesses, it is not well executed by a deed attested by one witness only or unattested (*f*). Such a defect of execution is not aided by Lord St. Leonards' Act. And it is expressly provided (*g*) that this statutory provision shall not operate to defeat any direction in the instrument creating the power that the consent of any person shall be necessary to a valid execution, or that any act shall be performed, in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument. Nothing contained in the Act shall prevent the donee of a power from exercising it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed (*h*).

Equity will aid the defective execution of a power, if the intended appointee be a purchaser from or the wife or a child or a creditor of the person intending to exercise the power, or if the appointment be for a charitable purpose (*i*); and this relief is granted, notwithstanding that the person entitled in default of appointment was a purchaser, and even against a purchaser from him, of

Equitable relief against defective execution of a power.

(*e*) Stat. 22 & 23 Vict. c. 35, s. 12, passed 13th Aug. 1859.

(*f*) Sug. Pow. 207, 8th ed.

(*g*) Stat. 22 & 23 Vict. c. 35, s. 12.

(*h*) Stat. 22 & 23 Vict. c. 35, s. 12.

(*i*) Sug. Pow. 533-536, 8th ed.; Farwell on Powers, 327, 2nd ed.; and see *Charlton v. Charlton*, 1906, 2 Ch. 523.

the estate limited in default of appointment (*k*). But such relief is only afforded to cure defects which are not of the essence of the power, such as the want of a seal or of the proper number of witnesses, or execution by will of a power to appoint by deed (*l*). And equity will not uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention (*m*). No relief will therefore be given against the exercise by deed of a power to appoint by will (*n*), or against the exercise by will of a power to appoint by deed to be executed before a specified event, which happened in the lifetime of the person purporting to appoint by will (*o*). It must not be forgotten that where a power to appoint the legal estate in lands is exercised defectively, but so that equity will grant relief against the defective execution, the legal estate remains outstanding in the person entitled in default of appointment, and must be got in if it be desired to make title under the appointment (*p*).

Title under a special power of appointment.

Where a title depends on the valid exercise of a special power of appointment, such as a power to appoint amongst a limited class of persons (the appointor's children, for instance), the conveyancer must, of course, see that the appointment is made in favour of those persons who are objects of the power (*q*), or some or one of them (*r*). And he must further ascertain that the appointment does not transgress the rules of

Fraudulent execution.

(*k*) Sug. Pow. 542, 8th ed.

(*l*) Sug. Pow. 548 *sq.*, 558, 559, 560, 8th ed.; Farwell on Powers, 330, 2nd ed.

(*m*) Rolt, L. J., *Cooper v. Martin*, L. R. 3 Ch. 47, 58; Sug. Pow. 560, 8th ed.

(*n*) *Reid v. Shergold*, 10 Ves. 370.

(*o*) *Cooper v. Martin*, *ubi sup.*

(*p*) Sug. Pow. 532, 8th ed.; Farwell on Powers, 327, 2nd ed.

(*q*) See Sug. Pow. 498 *sq.*, 652 *sq.*, 664 *sq.*, 8th ed.; Farwell on Powers, 298 *sq.*, 486 *sq.*, 2nd ed.

(*r*) As to exclusive appointments, see Farwell on Powers, 362 *sq.*, 2nd ed.; Wms. Pers. Prop. 369, 16th ed.

equity with respect to the fraudulent execution of such powers; as where an appointment is made ostensibly for the benefit of some object of the power but with the real design of effecting some other purpose than that contemplated by the power (*s*). Where these rules are transgressed, it must be remembered that the appointment, if of the legal estate in lands, may be void in equity only, but not at law (*t*); so that where a title depends on the avoidance of such an appointment, the legal estate may have to be got in from the appointee. Another point to be borne in mind in considering the exercise of powers of appointment amongst a limited class of persons is the question whether the appointment infringes any of the established rules with respect to remoteness of limitation. In such cases, the validity of the estates limited by the instrument exercising the power depends on the result of the inquiry whether they would have been valid if inserted in the instrument which created the power. And in investigating this point, the conveyancer must not forget that, as the law now stands, powers given by a marriage settlement or any other instrument to appoint estates in land amongst the *issue* of the marriage or of some specified living person, cannot well be exercised in such a way that the unborn child of a child unborn when the instrument took effect shall take either a legal or an equitable estate in remainder expectant on a life estate appointed to his or her parent (*u*); or so that a legal or an equitable estate appointed in remainder after a life estate appointed to some such unborn child shall be such as need not necessarily vest (if at all) within the period allowed by the rule against perpetuities (*x*); or so that

Remoteness
of limitation

Exercise of
powers to
appoint land
amongst un-
born *issue*.

(*s*) See Sug. Pow. 606 *sq.*, 8th ed.; Farwell on Powers, 403 *sq.*, 2nd ed.

(*t*) See Sug. Pow. 606—608, 8th ed.

(*u*) *Whitby v. Mitchell*, 44 Ch. D. 85; *Re Nash*, 1910, 1 Ch. 1.

(*x*) *Re Frost*, 43 Ch. D. 246, followed in *Re Ashforth*, 1905, 1 Ch. 535 (as to which case, see

any future estate or interest, whether legal or equitable, appointed to arise in favour of any child or issue unborn when the instrument took effect by way of shifting use or other executory limitation (and not by way of remainder) shall be such as contravenes the rule against perpetuities (*y*).

Attestation
clause to
instruments
exercising
powers.

Where an instrument creating a power of appointment has required that certain acts done in connection with the exercise of the power (such as the signing, sealing and delivery of a deed or writing) shall be attested by witnesses, the attestation clause of the instrument exercising the power should be examined with special care, as the omission to express therein that some or one of such required acts has been duly attested may vitiate the exercise of the power. On this subject Lord Justice Farwell (*z*) has laid down the following rule as the result of the authorities:—"If a power requires two or more formalities to be attested, and the attestation clause expressly certifies that one of such formalities has been performed, then the power is not well executed (*a*). But if the attestation, although a limited and special one, is of such a nature that it must necessarily be inferred that the other requisites

Mr. Charles Sweet's criticism in 49 Sol. J. 793, which it is respectfully submitted is well founded); *Whitby v. Von Luedecke*, 1906, 1 Ch. 783.

(*y*) See Wms. Real Prop. 361-366, 405-417, 21st ed.; and the writer's articles on Contingent Remainders and the Rule against Perpetuities in the *Encyclopædia of English Law*, 2nd ed.

(*z*) Farwell on Powers, 135, 2nd ed.

(*a*) *Vincent v. Bishop of Sodor and Man*, 4 De G. & Sm. 294, 307; 5 Ex. 683, 694. In *Wright v. Wakeford*, 17 Ves. 454, 4

Taunt. 213, where a power of consent to a sale was required to be exercised by writing under hand and seal attested by two or more credible witnesses, and the attestation clause of the deed exercising the power only certified that it was sealed and delivered in the presence of two witnesses, it was held that the power was not well executed. The like defect in instruments exercising powers executed before the 30th July, 1814, was cured by stat. 54 Geo. III. c. 168: but this Act had no prospective operation.

were complied with (*b*), or if the attestation is general, then the execution is valid, unless the contrary is shown" (*c*). This rule is, of course, subject to the above-mentioned provisions of the Wills Act and Lord St. Leonards' Act (*d*), which have greatly diminished its importance in practice.

It may be noted here that, whenever an abstract of title mentions some express power of which the exercise might affect the property sold, but no exercise thereof is subsequently stated in the abstract (*e*), the purchaser's advisers should inquire whether the power has been exercised.

Inquiry whether a power mentioned in the abstract has been exercised.

When property is sold or conveyed in the exercise of a power created by statute, there is the same necessity for exact compliance with all the terms and conditions of the power as exists in the case of a power created by the act of parties (*f*); and in default of such compliance any instrument purporting to exercise the power is, as a rule, void (*g*). At the present time the most important

Sale under statutory power.

(*b*) See *Vincent v. Bishop of Sodor and Man*, 4 De G. & Sm. 294; 5 Ex. 683, where a power required to be exercised by will signed and published in the presence of and attested by two or more witnesses was held to be well executed by a will purporting to be signed and sealed in the presence of two witnesses, on the ground that sealing in the presence of witnesses must naturally and reasonably be considered to be a publication of the will; *Smith v. Adkins*, L. R. 14 Eq. 402, where a power to be exercised by any instrument in writing signed, sealed and delivered in the presence of two or more witnesses was held to be well executed by a will stated in the attestation clause to be signed, sealed, published and acknowledged to be the last will of the donee of the power; this

was on the ground that publication of a will is equivalent to delivery thereof.

(*c*) See *Burdett v. Duc d. Spilsbury*, 10 Cl. & Fin. 340, where a power to be exercised by will signed, sealed and published in the presence of and attested by three witnesses was held to be well executed by a signed and sealed will with this attestation clause, "Witness, Charles Ball, Eliz. Ball, Ann Ball."

(*d*) Above, pp. 294, 295.

(*e*) Above, p. 113.

(*f*) Above, p. 293.

(*g*) *Davies v. Davies*, 38 Ch. D. 499; *Mogridge v. Clapp*, 1892, 3 Ch. 382, 398; *Sutherland v. Sutherland*, 1893, 3 Ch. 169; *Chandler v. Bradley*, 1897, 1 Ch. 315; *Re Handman and Wilson's Contract*, 1902, 1 Ch. 599; *Boyce v. Edbrooke*, 1902, 1 Ch. 836.

Sales under
the Settled
Land Acts.

statutory power of sale is that given by the Settled Land Acts, 1882 to 1890. When title is made by means of the exercise of this power of sale, the points to which the attention of the purchaser's counsel should be principally directed are the following :—In the first place he must ascertain that the property so conveyed or to be conveyed is settled land (*h*), and that the person who has exercised or is to exercise the power is a tenant for life or a person having the powers of a tenant for life within the meaning of the Acts (*i*). He must next inquire whether such property comprises the principal mansion-house on the settled land and the pleasure grounds and park and lands usually occupied therewith or any part of the same, and if so, he must see that the assurance of that part of the property was or shall be made with the consent of the trustees of the settlement or under an order of the Court as required by the Settled Land Act, 1890 (*k*). Thirdly, he must assure himself that the purchase money was or shall be paid to duly constituted trustees of the settlement for the pur-

The Leases Acts, 1849 and 1850, apply to an intended exercise of a statutory as well as to an express power of leasing; see above, p. 293, n. (*b*).

(*h*) See stat. 45 & 46 Vict. c. 38, ss. 2 (1—4, 10), 3. By s. 2, sub-s. 10 (*i*), in this Act land includes incorporeal hereditaments, also an undivided share in land. In *Re Brotherton's Estate*, 1908, W. N. 56, 98 L. T. 547, it was considered by the C. A. that an easement incident to settled land, as the dominant tenement, and exercisable over other land might well be sold under the Settled Land Acts to the owners of the servient tenement; although the Court appeared to entertain a doubt (which it is respectfully submitted was not well founded) whether such an easement could be ex-

changed under the Acts for another easement, which the owners of the before mentioned servient tenement were entitled to exercise over the settled land. See *Shep. Touch.* 292, that a right of way may be the object of an exchange; 24 L. Q. R. 260, and n. (3), 262—265.

(*i*) See stat. 45 & 46 Vict. c. 38, ss. 2 (5—7), 58.

(*k*) Stat. 53 & 54 Vict. c. 69, s. 10, replacing 45 & 46 Vict. c. 38, s. 15; see *Pease v. Courtney*, 1904, 2 Ch. 503; *Gilbey v. Rush*, 1906, 1 Ch. 11; *Re Wythes' Settled Estates*, 1908, 1 Ch. 593. For the principles by which the Court is guided in exercising the jurisdiction so conferred, see *Re Ailesbury's Settled Estates*, 1892, 1 Ch. 506; *Bruce v. Ailesbury*, 1892, A. C. 356.

poses of the Acts (*l*), or into Court (*m*). This is essential to the valid exercise of the power of sale given by the Acts; and even where the settled land is subject to some incumbrance, which is prior to the settlement, and of which the amount exceeds the whole price, the purchase money cannot properly be paid to the incumbrancer on a sale under the Acts unless the trustees concur in the conveyance to direct such payment (*n*). Fourthly, he must be satisfied that all the estate, to which title is alleged or required to be made under this statutory power, has been or will be duly assured by the exercise of the statutory power of conveyance (*o*) by the tenant for life, either alone or with the concurrence of all other necessary parties, if any. He must also see that there is nothing in the whole transaction carried out by exercising the statutory power which is inconsistent with the duty of the tenant for life, in exercising the statutory power, as trustee for all parties entitled under the settlement (*p*). As is well known, a tenant for life intending to exercise the statutory power is required to give one month's previous notice of his intention to the trustees of the settlement (*q*), but a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice so required (*r*). It is therefore unnecessary, when title is alleged or promised under an exercise of the statutory power, to make any inquiry whether notice has been duly given to the trustees. And it is improper to make any such inquiry; for if the purchaser ask this question and be informed

As to giving notice of an intended sale.

(*l*) See stats. 45 & 46 Vict. c. 38, ss. 2-81, 38-40; 53 & 54 Vict. c. 69, s. 16.

(*m*) Stat. 45 & 46 Vict. c. 38, s. 22 (1).

(*n*) *Re Norton and Las Casas' Contract*, 1909, 2 Ch. 59.

(*o*) Stat. 45 & 46 Vict. c. 38, s. 20.

(*p*) See stat. 45 & 46 Vict. c. 38,

s. 53; *Sutherland v. Sutherland*, 1893, 3 Ch. 169; *Chandler v. Bradley*, 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*q*) Stats. 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.

(*r*) Stat. 45 & 46 Vict. c. 38, s. 45 (3).

in answer of facts disclosing some irregularity, he may lose the benefit of the protection undoubtedly afforded to those who abstain from inquiry (*s*). It has been held that it is not a condition precedent to making a valid contract for sale under the Settled Land Acts that the tenant for life should give notice of his intention to the trustees; he can enter into a binding contract for sale without giving any such notice (*t*), even though there be no trustees of the settlement in existence (*u*); and it will be sufficient to give the purchaser a good title if trustees be duly appointed before the contract is completed (*u*). But although the purchaser is not concerned to inquire whether notice of the intention to sell were given to the trustees, he is not equally unconcerned with the question, whether there are any trustees of the settlement in existence at the time when the statutory power is completely exercised by conveyance. The Act provides that capital money arising from a sale made thereunder shall be paid either to the trustees of the settlement or into Court, at the option of the tenant for life (*w*); and it is held that the existence of such trustees is a condition precedent to the exercise of this option (*x*). Consequently, a vendor selling under the Settled Land Acts cannot make a good title, where there are no trustees of the settlement for the purposes of the Acts and the purchaser has notice of this fact, by requiring the purchase money to be paid into Court and conveying in consideration of such payment (*y*); but trustees must first be duly appointed, and then the sale can be completed. It appears, however, that if the purchaser,

As to whether there are trustees of the settlement at the time of sale.

(*s*) See *Marlborough v. Sartoris*, 32 Ch. D. 616, 623; *Hatten v. Russell*, 38 Ch. D. 334, 344.

(*t*) *Marlborough v. Sartoris*, 32 Ch. D. 616.

(*u*) *Hatten v. Russell*, 38 Ch. D. 334.

(*w*) Stat. 45 & 46 Vict. c. 38,

s. 22 (1).

(*x*) *Hatten v. Russell*, 38 Ch. D. 334, 345; *Re Fisher and Grazebrook's Contract*, 1898, 2 Ch. 660.

(*y*) *Re Fisher and Grazebrook's Contract*, 1898, 2 Ch. 660; and see *Hughes v. Fanagan*, 30 L. R. Ir. 111.

supposing that there are trustees of the settlement in existence and in ignorance that there are not, pay the purchase money into Court in good faith at the vendor's request, he will obtain a good title by a conveyance in consideration of such payment (z). It seems therefore that, if on a sale under the Settled Land Acts it appear from the abstract that trustees of the settlement were duly constituted or appointed, a purchaser directed to pay his purchase money into Court need not inquire whether such trustees still remain in existence. But if it appear from the abstract that there are no such trustees in existence, then the purchaser must require trustees for the purposes of the Acts to be appointed, and cannot safely pay the money into Court and accept a conveyance accordingly, without first seeing that such appointment has been duly made. Where the vendor's title depends on a former exercise of the power of sale given by the Settled Land Acts whereon the purchase money was paid into Court, and it appears from the abstract that there were no trustees of the settlement in existence at the time when the power was exercised by conveyance, the purchaser should, it seems, take the objection that the power was not well exercised unless there were such trustees in existence at that time, and should require proof of their existence to be furnished accordingly. If, however, such proof cannot be furnished, it will have to be considered whether a good title can be made on the ground that the purchaser from the tenant for life, supposing that there were such trustees, bought in good faith in ignorance of the fact that there were none (a). It has been held in the case of a building lease made by a tenant for life under the Settled Land Acts in the absence of any trustees, where no capital money was payable on granting the lease, that the

(z) *S. C.*, 1898, 2 Ch. 662.

(a) Cf. *Re Handman and Weldon's Contract*, 1902, 1 Ch. 599.

existence of trustees of the settlement was not a condition precedent to the validity of the lease, and that a purchaser from the lessee must presume, in the absence of evidence to the contrary, that the lessee acted in good faith and had no notice of the irregularity (*b*). But in such a case, the only necessity for trustees is that due notice of the intention to lease may be given to them; and lessees and purchasers are expressly exonerated from the obligation of inquiring as to the giving of such notice (*c*). Where, however, any capital money has to be paid by a lessee or purchaser, the case is different (*d*); and there is not the same statutory absolution from the duty of inquiring into the existence of trustees. But even on a sale of settled land, the trustees have no active duty to perform, if the tenant for life desire that the purchase money shall be paid into Court. And as it is provided that a purchaser dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have complied with all the requisitions of the Act (*e*), and it is presumed generally that everything is rightly done until the contrary be shown (*f*), it seems that in this case also it would be presumed that the purchaser from the tenant for life acted in good faith without notice of the irregularity (*g*); and if nothing appeared to rebut this presumption, the title would be unimpeachable.

Who are trustees for the purposes of the Settled Land Acts.

In ascertaining who are the trustees for the purposes of the Settled Land Acts of any given settlement, it should be borne in mind that such trustees must be either—(1) the persons who are for the time being

(*b*) *Mogridge v. Clapp*, 1892, 3 Ch. 382.

(*c*) Above, p. 301.

(*d*) *Mogridge v. Clapp*, 1892, 3 Ch. 400.

(*e*) Stat. 45 & 46 Vict. c. 38, s. 54.

(*f*) Above, p. 118.

(*g*) See *Mogridge v. Clapp*, 1892, 3 Ch. 382.

trustees under the settlement with power of sale of the settled land, or with power of consent to or approval of the exercise of such a power of sale (*h*); or (2) if there be no such trustees, the persons declared by the settlement to be trustees thereof for the purposes of the Acts (*i*); or (3) the persons appointed by the Court to be trustees under the settlement for the purposes of the Acts (*k*); or (4) if there be no trustees for the purposes of the Acts of any of the above-mentioned three classes, then the persons (if any) who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale (*l*); or (5) if there be no such persons as are fourthly described, then the persons who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, whether the power or trust take effect in all events or not (*m*). Each of these classes must be taken to

(*h*) It is important to observe that trustees of a settlement, who have no such power of sale, consent or approval as above mentioned, are not trustees thereof for the purposes of the Acts unless they come within classes (4) or (5) introduced by the amending Act of 1890; see *Whedwright v. Walker*, 23 Ch. D. 752, 761; *Re Morgan*, 24 Ch. D. 114; *Re Carne's Settled Estates*, 1899, 1 Ch. 324; *Re Coull's Settled Estates*, 1905, 1 Ch. 712. But trustees with a power of sale exercisable with the consent of the tenant for life are trustees for the purposes of the Acts; *Constable v. Constable*, 32 Ch. D. 233.

(*i*) Stat. 45 & 46 Vict. c. 38, s. 2 (8).

(*k*) Sect. 38.

(*l*) See *Re Moore*, 1906, 1 Ch. 789.

(*m*) Stat. 53 & 54 Vict. c. 69, s. 16. As to cases affected by this amendment of the law, see *Re Brown's Will*, 27 Ch. D. 179; *Whedwright v. Walker*, 23 Ch. D. 752, 761; *Re Horne's Settled Estate*, 39 Ch. D. 84. When lands are limited to trustees in fee in trust for one of them for life and after his death on trust for sale or for others with power of sale, it has been held that all the trustees, including the tenant for life, are the trustees for the purposes of the Settled Land Acts; *Re Jackson's Settled Estate*, 1902, 1 Ch. 258.

include any trustees or trustee duly appointed under an express or statutory power to appoint new trustees as well as the trustees originally appointed. It has been expressly provided that the statutory power of appointing new trustees shall apply to trustees for the purposes of the Settled Land Acts, whether appointed by the Court or by or under the settlement (*n*).

Deposit on
sale by
auction of
settled land.

As above stated (*o*), it is usual on sales by auction to stipulate for payment of a deposit to the auctioneer or the vendor's solicitors. If the sale be made by a tenant for life selling under the Settled Land Acts, the purchaser must see that the deposit is duly paid to the trustees of the settlement for the purposes of the Acts, or into Court, as the vendor may require, before he accepts a conveyance and pays the balance of his purchase money. Otherwise he cannot be assured that he is obtaining a valid conveyance; for unless the whole of the purchase money be paid to the trustees or into Court, as required by the Acts, the statutory power of sale is not well executed (*p*).

As to the
power of
conveyance
under the
Settled Land
Acts.

With regard to the question, whether all the estate, to which title is alleged or required to be made, has been or will be sufficiently assured by the exercise of the statutory power of conveyance (*q*), the Settled Land Act, 1882 (*r*), empowers the tenant for life to convey by deed any land sold under the power of sale conferred by the Act for the estate or interest which is the subject

(*n*) Stat. 56 & 57 Vict. c. 53, s. 47, replacing 53 & 54 Vict. c. 69, s. 17, passed to amend the law laid down in *Re Wilcock*, 34 Ch. D. 508.

(*o*) Above, p. 57.

(*p*) Above, pp. 299—302.

(*q*) Above, p. 301.

(*r*) Stat. 45 & 46 Vict. c. 38, s. 20. Exactly the same power

of conveyance is given in the same section with regard to land exchanged, partitioned, leased, mortgaged or charged in exercise of the powers conferred by the Act, and also with regard to easements or other rights or privileges sold or leased under the same powers.

of the settlement, and provides that such a deed shall be effectual to pass the land conveyed discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting thereunder, but *subject to and with the exception of*—(i.) All estates, interests and charges having priority to the settlement; and (ii.) all such other (if any) estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

The Act contains (s) a very wide definition of the term *settlement*, extending it to any instrument or any number of instruments under or by virtue of which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession. And this definition has received a liberal interpretation. Thus, in *Re Ailesbury and Iveagh* (t), lands had been limited by deeds dated in 1796 and 1826 to such uses as Charles and George should jointly appoint, and in default to the use of Charles for life with powers of jointuring a future wife; and Charles appointed a jointure rentcharge to Maria. Then by a deed of 1837 the lands were limited in exercise of the joint power of appointment, subject to the rentcharge, to the use of Charles for life, remainder to George for

What is "the settlement."

Re Ailesbury and Iveagh.

(s) Stat. 45 & 46 Vict. c. 38, s. 2 (1).

(t) 1893, 2 Ch. 345.

life, remainder to Ernest for life, remainder to Ernest's first son in tail male. In 1863, the estate tail so given to Ernest's first son was barred and the lands were re-settled to the use of Ernest for life, remainder to his eldest son George John for life, remainder to uses for securing a jointure rentcharge to Evelyn, the son's wife, remainder to George John's first son in tail male. George John died leaving Thomas his eldest son, and in 1885 Thomas's estate tail was barred and the lands were re-settled to the use of Ernest for life in restoration of his former estate, remainder to Thomas for life. Ernest died, and Thomas sold the lands under the Settled Land Acts to Lord Iveagh. And it was held by Stirling, J., that the series of instruments constituting the settlement for the purposes of the Acts comprised not only the deeds of settlement of 1885 and 1863 taken together, but also those of 1837, 1826 and 1796, and consequently that Thomas was empowered to convey the lands sold discharged from Maria's as well as from Evelyn's rentcharge. This decision at first met with adverse criticism (*u*), but it has been approved by the Court of Appeal in the case of *Re Mundy and Roper's Contract* (*x*). In that case lands were limited in 1861 to the use of John for life, remainder to uses for securing a jointure rentcharge to Elizabeth, remainder to trustees for the term of one thousand years from John's death on trust to raise portions for his younger children, remainder to Francis for life, with powers of jointuring and charging portions for younger children and limiting a term to secure such portions, remainder to Francis's first son in tail male. In 1865 Francis appointed a jointure rentcharge to Louisa his wife, charged the lands with portions for his younger children, and limited a term of 1,500 years to secure

*Re Mundy
and Roper's
Contract.*

(*u*) 37 Sol. J. 336; Wolstenholme's Conveyancing and Settled

Land Acts, 289, 7th ed.
(*x*) 1899, 1 Ch. 275.

such portions. John died, and in 1889 Francis and his eldest son disentailed, and the lands were re-settled with the concurrence of John's younger children, who released their portions, to the use that Francis might charge the lands with 5,000*l.*, remainder to uses for securing rentcharges to Millicent and Sophy (two of John's younger children) and Francis's eldest son, remainder to Francis for life without expressing that this should be in restoration of his former estate. Francis then sold the lands under the Settled Land Acts, and the purchaser objected that his life estate under the settlement of 1861 was not kept alive, and that he could not convey the lands discharged from his wife's jointure or his younger children's portions. It was held, however, by the Court of Appeal, that the deeds of 1861, 1865 and 1889 together constituted the settlement within the meaning of the Settled Land Acts, and that the tenant for life was accordingly empowered to convey the settled lands discharged from his wife Louisa's jointure and his younger children's portions charged in 1865 under the powers given by the deed of 1861; and it was considered that this result was effected by the intention of the Acts, and that it was immaterial that Francis's life estate under the deed of 1861 was not expressed to be restored to him by the re-settlement of 1889. These cases establish that when lands have been limited to various beneficiaries successively by a series of family settlements or re-settlements, and there is still subsisting in the lands any estate or interest (though it be no more than a rentcharge or a charge of portions) limited to a beneficiary by any deed of settlement earlier than that which conferred the estate of the tenant for life, then these deeds of settlement together constitute a settlement for the purposes of the Settled Land Acts, and the tenant for life can sell and convey the settled lands free from the estates or interests limited to beneficiaries by any of the earlier

Assignments
of or charges
on the life
estate in
consideration
of marriage
or by way of
family
arrangement.

deeds (*y*). The term *beneficiaries* is here applied to persons taking some estate or interest by way of settlement, that is to say, in consideration of marriage or natural affection or of effecting a family settlement or re-settlement; the rule does not extend to estates created by way of mortgage, or, apparently, on a sale in the strict sense of the word (*z*). The definition of the settlement has been further extended by the Settled Land Act, 1890 (*a*), providing that every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of sect. 50 of the Act of 1882 (*b*).

The compound
settlement.

Trustees of
the compound
settlement.

When, however, a settlement for the purposes of the Settled Land Acts was first held to be constituted by a series of deeds of family settlement, the question arose, who could be the trustees of such settlement; for any trustees appointed by any of the deeds were only trustees of the family settlement made by that deed. The difficulty was solved by the appointment by the Court of trustees for the purposes of the Acts of the compound settlement (as it was called) constituted by the series of

(*y*) See also *Re Wimborne and Browne's Contract*, 1904, 1 Ch. 537; *Re Phillimore's Estate*, 1904, 2 Ch. 460; *Re Marshall's Settlement*, 1905, 2 Ch. 325.

(*z*) Above, pp. 1, 266.

(*a*) Stat. 53 & 54 Vict. c. 69, s. 4, which is to apply and have effect with respect to every disposition before as well as after

the passing of that Act, unless inconsistent with the nature or terms of the disposition.

(*b*) See *Re Ailesbury's Settled Estates*, 69 L. T. N. S. 493; *Re Tibbits' Settled Estates*, 1897, 2 Ch. 149; *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, 108–110. Section 50 of the Act is stated below, p. 321.

family settlements (*c*). It is accordingly necessary, whenever title is made through an exercise of the statutory power of sale by a tenant for life under such a compound settlement, for the purchaser's counsel to satisfy himself that the persons who are alleged to be the trustees of the settlement are the duly constituted trustees of the compound settlement (*d*). In regard to this question, care must be taken to distinguish the cases where a tenant for life purports to convey the settled land for all the estate limited by a compound settlement from those in which he is really selling and conveying as tenant for life under a simple deed of family settlement, of which trustees for the purposes of the Settled Land Acts have been duly appointed. Where a deed of family settlement in the usual form has been executed containing powers of jointuring or charging portions and an appointment of trustees for the purposes of the Settled Land Acts, and these powers have been executed by some subsequent deed or deeds, the original deed still remains the settlement for the purposes of the Acts, and on a sale by the tenant for life thereunder the trustees thereof are the proper persons to receive the purchase money (*e*). The original deed also remains the settlement for the purposes of the Acts and the trustees thereby appointed remain the trustees of the settlement, notwithstanding the absolute assignment over (*f*) or the re-settlement of any estate limited

(*c*) *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345, 358, 359; *Re Mandy and Roper's Contract*, 1899, 1 Ch. 275, 298.

(*d*) See *Re Spencer's Settled Estates*, 1903, 1 Ch. 75; *Re Coul's Settled Estates*, 1905, 1 Ch. 712.

(*e*) *Re Keck and Hart's Contract*, 1898, 1 Ch. 617; *Re Du Cam and Nettlefold's Contract*, 1898, 2 Ch. 96, approved *Re Mandy and Roper's Contract*, 1899, 1 Ch. 275, 296. The earlier case of *Re Tibbits' Settled Estates*, 1897, 2 Ch.

149, which at first occasioned great difficulty to the profession, must now be taken as having decided no more than that it is within the jurisdiction of the Court to treat a deed of settlement followed by deeds exercising powers contained therein as together constituting a compound settlement and to appoint trustees of such compound settlement accordingly.

(*f*) *Wheelwright v. Walker*, 23 Ch. D. 752.

by the original deed in remainder after the estate of the tenant for life (*g*). Where there has been a deed of settlement creating estates for life and in tail and appointing trustees for the purposes of the Settled Land Acts, and afterwards a disentailing assurance has been executed with the concurrence of the tenant for life and a re-settlement made limiting the lands to the use of the tenant for life in restoration of his former estate or otherwise expressing the intention that the powers given to the trustees of the original deed of settlement shall not be destroyed (*h*), the tenant for life can exercise his statutory power of sale as tenant for life under the settlement made by the first deed and require the purchase money to be paid to the trustees for the purposes of the Settled Land Acts appointed by or under that deed. And he may do this, although he subsequently part with his old life estate, and even if his old life estate were extinguished by the re-settlement; since the powers conferred by the Acts are incapable of assignment or release (*i*). It follows that, where upon such a re-settlement the former estate of the tenant for life is not expressed to be restored, and the powers given by the original settlement are not expressly preserved, the tenant for life can nevertheless, by an exercise of his statutory power, sell under the original settlement and convey all the estate thereby limited, including that dealt with by the re-settlement; and upon such a sale the trustees of the original settlement will be enabled to give a good discharge for the purchase money. As we have seen (*k*), after a settlement and re-settlement of this kind, any person who has taken a life estate under

(*g*) *Re Knowles' Settled Estates*, 27 Ch. D. 707; *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, 101.

(*h*) See *Re Wright's Trustees and Marshall*, 28 Ch. D. 93.

(*i*) *Re Wimborne and Broune's Contract*, 1904, 1 Ch. 537; and see *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296, 297; below, pp. 318, 324.

(*k*) Above, p. 309.

the re-settlement (whether he were tenant for life under the original settlement or not) can sell as tenant for life under the compound settlement (consisting of the original settlement and the re-settlement taken together) and convey all the estate limited by and still subsisting under such compound settlement; but in such a case trustees of the compound settlement must be duly appointed to receive the purchase money (*l*). It has further been considered that in such cases of a settlement and re-settlement, the re-settlement alone may be treated as the settlement for the purposes of the Settled Land Acts, notwithstanding that the settlement and re-settlement may together be treated as a compound settlement (*m*). If in such cases the tenant for life purport to sell and convey as tenant for life under the re-settlement alone, the purchase money can be paid to the trustees for the purposes of the Acts appointed by the deed of re-settlement: but the assurance made by the tenant for life will only operate to convey the settled land discharged from the limitations of the re-settlement; and if on such a sale any estate or interest limited by the original settlement should be still subsisting, the persons entitled thereto must concur in the conveyance to the purchaser in order to release the same.

As above stated, the principle governing these decisions is that in determining whether a man is tenant for life under a series of instruments constituting a so-called compound settlement, or under what settlement he is tenant for life for the purposes of the Settled Land Acts, the true test is not whether he is *in* of his old estate or whether an intention of keeping

Principle to determine under what settlement one is tenant for life.

(*l*) See *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 294, 296, 298; *Re Spencer's Settled Estates*, 1903, 1 Ch. 75.

(*m*) *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 295—296.

*Re Cornwallis
West and
Munro's
Contract.*

alive the powers annexed to any former life estate of his has been expressed, but regard is to be had solely to the intention of the Acts and the definitions therein contained; for the powers conferred by the Acts acquire their validity, not from any antecedent act or intention of the parties to a settlement, but from the sovereign power of the legislature alone (*n*). This principle, however, appears to have been disregarded by Farwell, J., in the case of *Re Cornwallis West and Munro's Contract* (*o*), of which the material facts appear to be these:—By virtue of a settlement made by will lands were limited to the use of A. for life, with remainder to the use of B. in tail male, and a jointure rentcharge was limited to issue thereout to the use of C., A.'s wife. A. and B., by a disentailing assurance duly enrolled, granted the lands to X. and Y. and their heirs, to such uses as A. and B. should jointly appoint; and by a deed of re-settlement A. and B., in exercise of this power, appointed the lands to such uses as they should by deed jointly appoint, and, in default of appointment, to the use that B. should receive thereout a yearly rentcharge, and subject and charged as aforesaid to the use of A. for life in restoration of his former estate under the will, with remainder to B. in fee; and D. and E. were appointed to be trustees of the deed of re-settlement for the purposes of the Settled Land Acts. A. afterwards contracted to sell the lands as tenant for life selling under these Acts, and he proposed to make title as tenant for life under the deed of re-settlement, the purchase money being paid to the trustees appointed thereby, and C., the jointress, concurring in the conveyance to release her jointure. The purchaser objected to the title so offered on the ground that the will

n) See *Re Ailesbury and Treagh*, 1893, 2 Ch. 345; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275,

293—297.

o) 1903, 2 Ch. 150; 72 L. J. Ch. 499.

and the re-settlement constituted a "compound settlement," and that, without the appointment by the Court of trustees of such compound settlement, a good discharge for the purchase money could not be given. Farwell, J., upheld this objection on the ground that A.'s old life estate under the will had been restored to him, and so the only settlement under which A. could exercise his statutory power of sale was either the compound settlement created by the will and the deed of re-settlement together, or else the original settlement created by the will (*p*). In so deciding the learned judge professed to follow the case of *Re Mundy and Roper's Contract* (*q*); but it is respectfully submitted that his decision is exactly opposed to the principles governing the judgment in that case and is manifestly wrong (*r*).

It appears, then, that in the common case of a settlement of lands on one for life with remainder in tail followed by a disentailing assurance and a re-settlement again limiting a life estate in the lands to the original

The courses open to a tenant for life after a re-settlement.

(*p*) See the explanation given in *Re Windborne and Browne's Contract*, 1904, 1 Ch. 537, 542.

(*q*) Above, p. 308.

(*r*) The Court of Appeal in *Mundy's case* adopted the view of eminent real property lawyers that the words "in restoration of his former life estate" have no real conveyancing value except as an expression of intention that the express powers appendant to that estate shall not be destroyed; Sug. Pow. 71, 8th ed.; Davidson, Prec. Conv. iii. 596, 3rd ed.; 1899, 1 Ch. 294. And the opinion of conveyancers certainly was that where upon a re-settlement a life estate was limited to a man in restoration of his former life estate, he was tenant for life under the new settlement as well as the old: see the form of re-set-

tlement given in Davidson, Prec. Conv. iii. 1030, 1039, 1059, 1060, where after limiting the first life estate to A. in restoration of his former estate, the powers of leasing and of consent to the exercise of the power of sale are given to "every person hereby made tenant for life" (when in possession) without naming any person. Besides, it may well be asked, how in *Cornwallis West's case* could B. have acquired a rentcharge in priority to A.'s life estate unless A.'s estate had been entirely taken away from and then given back to him? But if the deed of re-settlement did indeed restore to A. that life estate with which he had previously parted, how can it be reasonably denied he was tenant for life under the re-settlement?

tenant for life, the following courses are open to him in selling the lands under the Settled Land Acts. First, whether his life estate were or were not limited to him in restoration of his former estate, he may sell as tenant for life under the old settlement, the purchase money being paid to trustees for the purposes of the Settled Land Acts duly appointed under the old settlement. Secondly, he may sell as tenant for life under the compound settlement constituted by the settlement and the re-settlement together and convey the whole estate limited by and still subsisting under such compound settlement: but then trustees of the compound settlement must first be appointed; and, unless all persons beneficially interested be *sui juris* and concur in making the appointment (*s*), this can only be done by the Court (*t*). Thirdly, it is submitted that, on the principles laid down in *Re Mundy and Roper's Contract* (*u*), he may sell as tenant for life under the re-settlement alone, when the trustees of the re-settlement may receive the purchase money; but in that case he can only convey the estate which was the subject of the re-settlement. This is certainly so where his life estate was not limited to him in restoration of his former estate (*x*); and should be so, although his life estate were limited in restoration of his former estate. But in the latter case, a difficulty is raised by the decision in *Cornwallis West's case* (*y*); and so long as that decision is not overruled, a purchaser could not be advised to accept the title as upon a sale under the re-settlement alone, if the estate of the tenant for life had been thereby given to him in restoration of his former estate.

(*s*) See *Re Spearman's Settled Estates*, 1906, 2 Ch. 502, deciding that tenant for life and tenant in tail in remainder of land free from incumbrances can, when disentailing, together appoint

trustees of a compound settlement.

(*t*) *Re Spencer's Settled Estates*, 1903, 1 Ch. 75.

(*u*) Above, pp. 308—314.

(*x*) Above, p. 313, and n. (*m*).

(*y*) Above, p. 314.

Where there has been a settlement and re-settlement and the tenant for life in possession derives his estate solely from the re-settlement and never had the estate or the powers of a tenant for life under the original settlement, he cannot of course make title as exercising the powers of a tenant for life under the old settlement, but can only sell as tenant for life either under the compound settlement or under the re-settlement alone (z).

Sale by tenant for life deriving his estate from the re-settlement alone.

As already stated (a), the tenant for life is empowered to sell and convey the settled land discharged from all the limitations of the settlement, and from all estates or interests subsisting or to arise thereunder: but this power is subject to three express qualifications or exceptions, of which the first is of all estates, interests, and charges having priority to the settlement. These may be exemplified by a lease granted or a mortgage made previously to the settlement, and also by charges to which a statutory priority is given, such as estate duty (b) or rentcharges created under the Improvement of Land Act, 1864 (c). And where there has been a settlement followed by a re-settlement or re-settlements, and the vendor purports to sell as tenant for life under the re-settlement or the last re-settlement alone, then, as we have seen (d), that re-settlement will be the settlement for the purposes of the Acts, and any estate or interest still subsisting, which has been created by or under some instrument of earlier date than that re-settlement, will be an estate or interest having priority to "the settlement" (e). The

The exceptions to the tenant for life's power of conveyance. Estates, &c. having priority to the settlement.

(z) Above, pp. 307—310, 312, 313.

(a) Above, p. 306.

(b) Stat. 57 & 58 Vict. c. 30, s. 9 (1); see the chapter on the Death Duties in the second volume.

(c) Stat. 27 & 28 Vict. c. 114; see ss. 49 *sq.*, 59; and see above, p. 177; below, Chap. X. § 6, Chap. XII. § 2.

(d) Above, p. 312.

(e) *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 289, 290.

Estates, &c. conveyed or created for securing money actually raised.

Re Dickin and Kelsall's Contract.

Mortgages by beneficiaries of their interests under the settlement.

Mortgage by tenant for life or remainderman of his estate.

second exception is of all such *other* estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed, whereby the tenant for life exercises his power of conveyance. The word *other* seems to relate here to the estates mentioned in the first exception; so that apparently the second exception is of all such estates, &c., other than those having priority to the settlement, as have been conveyed or created for securing money actually raised. This exception has now been judicially interpreted as being an exception (in the proper sense of the word) out of the enabling words of sect. 20 of the Settled Land Act, 1882 (*f*), and as including only such estates, interests and charges, conveyed or created for securing money actually raised at the date of the deed, *as subsist or arise under the settlement*. And it has been considered that *estates, interests and charges subsisting or to arise under the settlement and conveyed or created for securing money actually raised* include only such mortgages or charges as have been made in pursuance of some power or trust for the purpose either expressly contained in the settlement or annexed by law to some estate or interest conferred by the settlement; and that these words (those printed in italics) do not extend to mortgages or charges made by some beneficiary under the settlement of the estate or interest thereby limited to him, and created in exercise of the right of alienation incident to his ownership. In particular, it has been decided that the second exception does not include a mortgage made by the tenant for life or any remainderman of his estate under the settlement, or, where the tenant for life is also the ultimate remainderman in fee simple under the settlement, a mortgage made by him of all his estate in the settled land. And it is held that, where such a mortgage has been made, the tenant

(*f*) Stat. 45 & 46 Vict. c. 38; see above, pp. 306, 307.

for life selling under the Settled Land Act (*g*), so long as he has obtained the consent as required by sect. 50 (*h*) of any mortgagee of his own life estate, is enabled under sect. 20 to convey the settled land to the purchaser discharged from the estate of the mortgagee or mortgagees and the charge or charges so created; and that the purchaser cannot require the mortgagee or mortgagees to concur in the conveyance (*i*). It follows of course from this decision that where land limited to one for life with remainder to another in fee simple has been mortgaged by a joint assurance of their estates to one mortgagee, his consent is all that can be demanded on a sale by the tenant for life under the Settled Land Acts and his concurrence in the conveyance cannot be required. *A fortiori*, the tenant for life can convey the settled land discharged from any mortgage made by any remainderman alone of his estate or interest under the settlement, if the charge were created solely in exercise of the right of alienation incident to his ownership and

Purchaser cannot require the concurrence of such mortgagees. Mortgage by tenant for life and remainderman in fee.

Mortgages by the remainderman alone.

(*g*) Stat. 45 & 46 Vict. c. 38.

(*h*) See below, p. 322.

(*i*) *Re Dickin and Kelsall's Contract* (Swinfen Eady, J.), 1908, 1 Ch. 213, 221. Prior to this decision, the writer's opinion was that, where a remainderman had mortgaged his estate under a settlement, a purchaser from the tenant for life selling under the Settled Land Acts could not safely accept the title without the concurrence of the mortgagee. The writer based this opinion on the wording of the Act and on the balance of authority prior to the decision above cited. His reasons were stated at large in 43 Sol. J. 274, and in the first edition of this book, vol. i. pp. 323—327, 330—334: but he expressed the view that the Court would strive to overcome the difficulty raised. These passages are omitted from the present edition, because it is not likely that the

above-cited decision (which is a most beneficial ruling for conveyancing practice) will be upset. It is respectfully submitted that the best justification for the decision seems to be found in the learned judge's observations (1908, 1 Ch. 218) that if the second exception above mentioned should extend to mortgages by beneficiaries for life or in remainder of their estates under the settlement, that would go far to render any sale under the Settled Land Acts impossible, and that mortgages by the remainderman should be governed by the same rule as absolute assurances of the remainderman's estate (as to which see above, pp. 311, n. (*f*), 312, n. (*g*)). On this ground the decision has been approved by the C. A.; *Re Davies and Kent's Contract*, 1910, 2 Ch. 35, 53 *sq.*

What mortgages come within the second exception.

Purchaser must require the concurrence of all, whose charges fall within the second exception.

not under any power or trust for the purpose contained in the settlement; and in such case neither the consent nor the concurrence of the mortgagee can be demanded. Instances of estates, interests and charges, which do fall within the terms of the second exception and cannot be displaced by the life-tenant's power of conveyance under the Settled Land Acts are those limited or created by mortgages made to secure sums of money actually raised under some trust or power contained in the settlement, such as to charge portions for younger children, for a tenant for life or in remainder to raise and charge a capital sum for his own benefit, or for the trustees of the settlement or the tenant for life or any other person entitled thereunder to raise money by mortgage for some purpose advantageous to all the beneficiaries, for example, for discharging incumbrances, enfranchising copyholds, or making improvements, or for equality of exchange or partition. The second exception also includes all estates or interests created in exercise of any power given by the Settled Land Acts (*k*) or any other statute for the tenant for life or any other person entitled under or by virtue of the settlement to mortgage or charge the settled land (*l*). And whenever it appears, upon a sale made by a tenant for life under the Settled Land Acts, that the settled land is subject to any estates or interests comprised within this second exception, the purchaser must require the persons entitled thereto to concur in the conveyance and assure their estates or interests to him (*m*). The second exception includes only estates or interests conveyed or created for *securing* money, that is, by way of mortgage or charge, and does not extend to those conveyed or created on an absolute sale, from which the settled land will be effectually

(*k*) See stats. 45 & 46 Vict. c. 38, ss. 18, 47; 53 & 54 Vict. c. 69, s. 11; see above, p. 285.

(*l*) Swinfen Eady, J., *Re Dickin*

and *Kelsall's Contract*, 1908, 1 Ch. 213, 221.

(*m*) See *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 289.

discharged by the tenant-for-life's conveyance under the Settled Land Acts (*n*). And all charges, terms or other estates to secure charges, and powers of charging limited by or contained in the settlement but not actually put in use or exercised by raising money thereunder may equally well be displaced in the same way (*o*).

The third exception from the estates, which a tenant for life is empowered by the Settled Land Acts to convey (*p*), appears to be confined to leases and grants made by the tenant for life, or his predecessors or the settlement trustees in exercise of some power or trust for the purpose contained in the settlement or of some statutory power (*q*).

The third exception from the life-tenant's power of conveyance.

With regard to dispositions made by a tenant for life of his life estate in exercise of the right of alienation incident to his ownership (*r*), the Settled Land Act, 1882 (*s*), provides that the powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement; also that a contract by a tenant for life not to exercise any of his powers under the Act is void (*t*). But these provisions are to operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the

Dispositions made by the tenant for life in exercise of the right of alienation incident to his ownership.

Rights of an assignee for value of the life estate.

(*n*) See *Wheelerwright v. Walker*, 23 Ch. D. 752; above, p. 311; *Re Duckin and Kelsall's Contract*, 1908, 1 Ch. 213, 218.

(*o*) *Stirling, J., Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, 108; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 290.

(*p*) Above, p. 307.

(*q*) See above, p. 318.

(*r*) Above, p. 318; Wms. Real Prop. 118, 21st ed.

(*s*) Stat. 45 & 46 Vict. c. 38, s. 50, sub-s. 1.

(*t*) Sect. 50, sub-s. 2.

Mortgages by
a tenant for
life of his
life estate.

assignee's rights are not to be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be necessary for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act (*u*). In this enactment "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a meaning corresponding with that of assignment (*x*). It is clear from this enactment that, where a tenant for life has mortgaged his life estate, he cannot make a valid title on a sale of the settled land under the Settled Land Acts without the *consent* of every such mortgagee (*y*). But as we have seen, it has been held that, if the tenant for life obtain the consent of every mortgagee of his life estate to his sale of the settled land under the Settled Land Acts, he can convey the land discharged from such mortgages and the purchaser cannot require the mortgagees to concur in the conveyance to him (*z*). It is thought, however, that the purchaser is entitled to require that the consent of every such mortgagee to the sale shall be absolute and not revocable, and shall be manifested as such by some writing signed by him or his authorised agent, and duly stamped as an agreement (*a*); for the giving of such consent appears to be of the nature of a contract respecting an interest in land and so to be governed by the fourth section of the Statute of Frauds (*b*). It is a

(*u*) Sect. 50, sub-s. 3.

(*x*) Sect. 50, sub-s. 4, by which sect. 50 is also extended to assignments made or coming into operation and to acts done before or after the commencement of the Act.

(*y*) *Re Sebright's Settled Estates*, 33 Ch. D. 429, 437, 438; *Cardigan*

v. Curzon-Howe, 40 Ch. D. 338, 340, 341; *S. C.*, 41 Ch. D. 375.

(*z*) *Re Dickinson and Kelsall's Contract*, 1908, 1 Ch. 213; above, p. 319.

(*a*) See above, p. 28, n. (*e*).

(*b*) Stat. 29 Car. II. c. 3; above, p. 3. The element of consideration appears to be present

question whether a lease granted by the tenant for life in exercise of the right of alienation incident to his ownership is a partial or qualified assignment within the meaning of the above enactment: but until it is decided not to be, a purchaser from the tenant for life should require him to obtain the consent of such a lessee to the sale. The effect of the above-quoted provisions is exactly the same as regards absolute assignments as in the case of mortgages of the life estate, the consent only of an absolute assignee for value of the life estate (and not his concurrence in the conveyance) being necessary to enable the tenant for life to convey the settled land discharged from the assignee's estate (*d*).

Lease granted by tenant for life at common law.

Absolute assignment for value of the life tenant's estate.

It must not be forgotten, however, that all assignments of the life estate made (whether absolutely or by way of charge) in consideration of marriage or as part or by way of any family arrangement are by the Settled Land Act, 1890 (*e*), excepted from the operation of sect. 50 of the Act of 1882; and the tenant for life is enabled, by the exercise of his power of sale and conveyance under this Act, to convey the settled land discharged from the estate or interest of any person entitled under an assignment of this kind. Thus where there has been a settlement followed by a re-settlement limiting a life estate to the same person who was tenant for life under the original settlement (whether in restoration of his former life estate or not), and he desires to sell under the Settled Land Acts as tenant for life under the original settlement (*f*), he need not obtain the consent of any person to whom he has by the re-settlement either in consideration of marriage or by way of some family arrangement made an assignment

Assignments of the life estate in consideration of marriage or by way of family arrangement.

Settlement and re-settlement limiting rent-charges in priority to the original life estate.

in giving such consent; as it is recorded on the terms of the mortgagee's charge being transferred to the vendor's interest in the purchase money.

(*d*) Above, pp. 318—322.

(*e*) Stat. 53 & 54 Viet. c. 69, s. 4; above, p. 310.

(*f*) See above, pp. 307—317.

Gratuitous
assignment of
the life estate.

Release of the
life estate.

of or charged his former life estate. For instance, if the re-settlement provide that in consideration of the marriage of his eldest son (being the tenant in tail) or by way of family arrangement, the son or the son's intended wife shall have a rentcharge or rentcharges to take effect during the father's lifetime in priority to his life estate, it will not be necessary for any person entitled to such a rentcharge to consent to the sale. And every such rentcharge will be displaced by the life-tenant's sale and conveyance in exercise of his statutory powers as tenant for life under the original settlement; the purchase money can safely be paid to the trustees for the purposes of the Settled Land Acts under the original settlement; and trustees of the compound settlement need not be appointed (*g*). It appears too that, where the tenant for life has made a gratuitous assignment of his life estate, he can nevertheless sell and convey the settled land freed from the assignee's estate, without his consent (*h*). It has been held that if a tenant for life assign or release an undivided share of the land he holds to the remainderman, so as to effect a merger of the life estate therein, he nevertheless retains his statutory power of sale over the whole of the land (*i*). And the tenant for life equally retains his powers under the Settled Land Acts where he has released his life estate to some remainderman entitled for life or in tail (whether under the original settlement or some re-settlement) so that the land still continues to be subject to a settlement, or (as

(*g*) See above, p. 310, and cases cited in n. (*b*).

(*h*) This seems to be the case, notwithstanding that by such an assignment the tenant for life has parted with the possession or receipt of the rents and profits of the settled land, and has so ceased to come within the definition of a tenant for life in stat. 45 & 46

Vict. c. 38, s. 2 (*5*); see *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296, 297; *Re Barlow's Contract*, 1903, 1 Ch. 382, 384 (in which case it is presumed that the release was made for value); *Re Wimborne and Browne's Contract*, 1904, 1 Ch. 537, 541, 542.

(*i*) *Re Barlow's Contract*, 1903, 1 Ch. 382.

it appears) where he has released his life estate to a remainderman in fee simple, but some rentcharge or charge of portions remains subsisting under the original settlement (*k*). But where no interest or charge remains subsisting or exercisable under the original settlement, it is a question whether the tenant for life would retain his statutory powers after the release by him to a remainderman in fee simple of his life estate in the whole of the settled land, for then the settlement would be brought to an end (*l*).

Another effect of sect. 50 of the Settled Land Act, 1882 (*m*), is that on the bankruptcy of a tenant for life his statutory powers do not pass to his trustee in bankruptcy but remain exercisable by him; and it is thought that the trustee cannot be said to be an assignee for value of the bankrupt's estate. It is also submitted that a purchaser from the trustee of the bankrupt's life estate is not "an assignee for value of the estate or interest of the tenant for life" within the meaning of sub-sect. 3 of this enactment (*n*), which seems to be intended to save only the rights of an assignee for value who has obtained the life estate by the direct assurance of the tenant for life himself (*o*). Where a contract for the sale of the settled land has been signed by the tenant for life, the subsequent commission by him of an act of bankruptcy, whether followed or not by an adjudication of bankruptcy, can be no bar to his effectual completion of the sale under the powers of the Settled Land Acts, and the purchaser need not require

Bankruptcy
of tenant
for life.

Act of bank-
ruptcy by the
tenant for
life after sale,
but before
completion.

(*k*) *Re Wimborne and Browne's Contract*, 1904, 1 Ch. 537; see above, p. 324: *Re Phillimore's Estate*, 1904, 2 Ch. 460; *Re Marshall's Settlement*, 1905, 2 Ch. 325.

(*l*) See *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296, 297.

(*m*) Above, p. 321.

(*n*) Above, p. 321.

o If this were not so, then the rights of a purchaser for value from a gratuitous assignee of the life-tenant's estate could not be affected without his consent. But it is submitted that this is not the law.

Sale under the
Settled Land
Acts by a
bankrupt
tenant for
life.

the consent or concurrence of the trustee in the bankruptcy or of any assignee from him of the bankrupt's life estate. For the trustee and any purchaser from him of the life estate would take the vendor's property subject to all equities affecting it, and to the right of the purchaser from the tenant for life to have his contract specifically performed, and the purchase money is payable, not to the trustee in the bankruptcy, but to the trustees for the purposes of the Acts or into Court (*p*). And if a tenant for life, who has already committed an act of bankruptcy or been adjudicated bankrupt, afterwards sell the settled land under the Settled Land Acts, there appears to be no doubt that he can well complete the sale in exercise of the power of conveyance given by the Acts, if the life estate has not then been sold by the trustee in the bankruptcy. Until it is established by decision that the power of the tenant for life to sell and convey is altogether paramount to the rights of his trustee in bankruptcy and any purchaser of the life estate from the trustee, it appears advisable for a purchaser of the settled land from a tenant for life, who has committed an act of bankruptcy or been adjudicated bankrupt, to ascertain, before paying his purchase money, either that no bankruptcy proceedings have been taken or no adjudication made (in either of which cases the vendor would clearly have full power to convey), or that no sale of the life estate has been made by the trustee. And if the trustee should have sold the life estate, it is thought that the purchaser from the tenant for life should require to be satisfied, before paying his purchase money, that the purchaser of the life estate does not claim to be entitled to keep hold of the settled land while the life estate endures but will peaceably yield up possession to him on completion (*q*).

(*p*) See and compare below,
Chap. XI., § 2.

(*q*) It is thought that if the
trustee in bankruptcy or the pur-

Where a debtor's life estate is vested in a trustee under a composition or scheme of arrangement approved by the Court in bankruptcy proceedings prior to any adjudication of bankruptcy (*r*), it is thought that the trustee is an assignee for value taking the life estate directly from the tenant for life; for the trustee acquires the life estate, not by mere operation of law, but by the debtor's own act and agreement under a contract sanctioned by the Court and in consideration of the creditors relinquishing their right to proceed to an adjudication of bankruptcy. The trustee appears in fact to be in the same position as a trustee under a deed of assignment of the life-tenant's estate executed for the benefit of his creditors without any bankruptcy proceedings having been taken. And it is thought that in either of these cases the trustee's rights cannot without his consent be affected by a sale subsequently made by the tenant for life of the settled land.

Trustee taking the life estate under a composition or scheme of arrangement in bankruptcy proceedings.

As the tenant for life is only empowered to convey the settled land for the estate or interest which is the subject of the settlement, and with the exceptions above mentioned (*s*), and cannot displace the rights of his assignees for value without their consent (*t*), it is of the highest importance for a purchaser from a tenant for life selling under the Settled Land Acts to ascertain, first, that the estate or interest which is the subject of the settlement is the whole fee simple or other estate contracted to be sold; and, secondly, that there is not any subsisting estate, interest, or charge, in or upon the lands sold which will not pass under the vendor's statutory con-

Purchaser from tenant for life should require evidence of the non-existence of estates, &c. which the latter cannot convey.

chaser of the life estate should so yield up possession to the purchaser from the tenant for life, that would be equivalent to a surrender by operation of law of the life estate in the settled land; see *Wms. Real. Prop.* 160, and

n. (*c*), 217, 21st ed.

(*r*) See stat. 53 & 54 Vict. c. 71, s. 3 (16, 17); see *Wms. Pers. Prop.* 252, 253, 16th ed.

(*s*) Above, pp. 307, 317—327.

(*t*) Above, p. 322.

veyance. With regard to the first of these requirements, the purchaser's counsel must ascertain from the abstract whether the settlor were seised of or otherwise well entitled to the whole estate in fee simple or other interest sold. And if this were the case, the tenant for life under the settlement can well convey the same estate or interest by an exercise of his statutory power of sale, even though the settlor did not dispose of his whole interest by the settlement. For the Settled Land Act, 1882 (*u*), provides that an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for the purposes of the Act, an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement. In order to ascertain whether there are any estates or interests coming within the exceptions out of a tenant-for-life's statutory power of conveyance, a purchaser from him should inquire, first, whether there are still subsisting in or upon the lands sold any estates, interests, or charges having priority to the settlement; secondly, whether any estates, interests, or charges in or upon the lands sold have been conveyed or created for securing money actually raised; thirdly, whether any such leases or grants as are mentioned in the third exception (*x*) have been made of the lands sold or any part thereof or any interest therein; and, fourthly, whether the tenant for life has made any assignment for value, whether absolute, partial, qualified or by way of charge, of his life estate. As the conveyance or creation of such an estate, interest, or charge, or the making of such a lease or grant, or such an assignment of the life estate, is an event which, if it took place, must necessarily have affected the title, it appears that

(*u*) Stat. 45 & 46 Vict. c. 38,
s. 2 (2); *Re Hunter and Hewlett's*

Contract, 1907, 1 Ch. 46.
(*x*) Above, pp. 307, 321.

the purchaser is entitled not only to insist upon an answer to this inquiry, but also to require evidence that no such event has occurred (*y*). But if the abstract be satisfactory, sufficient evidence may be afforded as to the subjects of this inquiry by a statutory declaration by the vendor that he has not made and does not know of any such estate, interest, charge, lease, or grant, and by solicitors, who have acted for the vendor and his predecessors, that they know of none, coupled with the facts of possession of the lands sold having gone and the custody of the title deeds being in accordance with the abstracted title (*z*). It is submitted that the making of these inquiries and the requisition of this evidence is not prohibited by the rule in the case of *Re Ford and Hill* discussed above (*a*). Sect. 20 of the Settled Land Act, 1882, does not confer on the tenant for life selling under that Act a general or an unlimited power of conveyance, but only gives him a limited power, subject to certain exceptions (*b*). It is thought, therefore, that the *onus* lies on him of proving that these exceptions have no application in his own particular case, and that he is bound to answer the above-mentioned inquiries as far as his knowledge is concerned. The practice, moreover, on sales under the Settled Land Acts is to abstract the limitations of the settlement down to the estate or interest, in virtue of which the vendor claims to have the statutory power of sale, but not further; and it is obvious that such an abstract is by no means conclusive of the vendor's ability to confer a good title. The purchaser is entitled to be satisfied that the vendor has not assigned, mortgaged or charged his life estate in any way, and that no charge or power of charging given by the settlement has been actually put in use or exercised

Practice as to abstracting the settlement on sales under the Settled Land Acts.

(*y*) Above, pp. 132—134.

(*z*) See above, pp. 132—134.

(*a*) 10 Ch. D. 365; above.

p. 178.

(*b*) See above, pp. 306, 307,

317 *sq.*

by raising money, and that no lease or grant of the land sold has been made under any statutory or express power; for if any one of these events has occurred, the vendor cannot make title by himself alone (*c*). And the usual abstract standing by itself affords no information on these points. For instance, a term on trust to raise portions for younger children is generally limited in remainder after their parent's life estate (*d*); and a portion is sometimes raised thereunder in the father's lifetime, and he joins in the mortgage to secure, either by his covenant or by a charge on his life estate, the interest on the amount advanced (*e*). In such a case the father could not sell under the Settled Land Acts without the concurrence of the mortgagees in the conveyance to the purchaser. Their consent alone would not suffice to assure their legal estate under their mortgage of the portions term. Here it should be noted that the second and third exceptions above mentioned from the life-tenant's power of conveyance prevent him from conveying the settled land, on a sale under the Settled Land Acts, discharged from any estates or interests falling within the terms of those exceptions and conveyed or created after the contract for sale but before the date of the deed of conveyance (*f*). Thus where since the contract but before the conveyance some estate, interest or charge has been conveyed or created under some trust or power for the purpose contained in the settlement (*g*) for securing money then actually raised, or some lease or grant has been made, or even agreed to be made, for value under some express or statutory power (*h*), the tenant for life cannot convey the settled land free from the estates or interests so arising, unless

The second and third exceptions relate to interests created before the date of conveyance, not of the contract for sale.

(*c*) See above, pp. 164—168, 318 *sq.*

(*d*) Davidson, *Prec. Conv.* vol. iii. 272, 3rd ed.; Williams on Settlements, 219.

(*e*) See Davidson, *Prec. Conv.*

vol. ii. part ii. 460—467, and notes, 4th ed.

(*f*) Above, pp. 306, 307, 317.

(*g*) Above, pp. 318, 320, 321.

(*h*) See above, pp. 307, 321.

the persons entitled thereunder concur in the conveyance to the purchaser and assure the same to him. It follows that the above-mentioned inquiries with respect to the second and third exceptions (*i*) ought to be repeated by the purchaser and an answer obtained immediately before the execution of the deed of conveyance. But it is thought that this extra precaution is not required with regard to mortgages or other assignments for value made by the tenant for life of his own life estate under the settlement. It is now decided that any estates or interests conveyed or created by such mortgages do not fall within the second exception above referred to, and the tenant for life has power to sell and convey the settled land freed from any estate arising under his own assignment (whether absolute or by way of charge) of his life estate, provided only that he obtain the consent of every assignee for value (*k*). Where a tenant for life has made no assignment of his life estate, either absolutely or by way of charge, at the time of entering into a contract for the sale of the settled land under the Settled Land Acts, it appears that by making such a contract he exercises a statutory power which is paramount, not only in equity but at law, to the rights of any subsequent assignee of his own life estate. And it is thought that the purchaser's claim to have the contract duly completed by conveyance has priority, not only in equity but at law, over the rights of any subsequent mortgagee or assignee for value of the life tenant's estate, even though the mortgagee or assignee should have obtained a legal estate without notice of the contract for sale (*l*).

(*i*) Above, p. 328.

(*k*) Above, pp. 318, 319.

(*l*) The Settled Land Act, 1882, gives to tenants for life express power to sell the settled land, and to contract to make any such sale, and enacts that

every such contract shall be enforceable against every successor in title for the time being of the tenant for life; stat. 45 & 46 Vict. c. 38, ss. 3, 31 (1, 2). A sale of land is made when a binding contract for sale is entered

As to seeing that a tenant for life selling has not committed any breach of his duty as trustee.

With regard to the general necessity for a purchaser from a tenant for life selling under the Settled Land Acts to see that the terms of the sale involve no breach of duty on the vendor's part (*m*):—The tenant for life is bound, as a rule, to sell for money, as other persons are on whom a power of sale has been conferred (*n*); and he cannot sell at a price to be fixed by arbitration (*o*). Sales under these Acts are also required to be made at the best price that can be reasonably obtained (*p*); and the tenant for life, in exercising any power under the Acts, is required to have regard to the interests of all parties entitled under the settlement, and is in the position and has the duties and liabilities of a trustee for those parties (*q*). But it is enacted that, on a sale under the powers given by the Acts, a purchaser dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price that could reasonably be obtained

into; see *Shaw v. Foster*, L. R. 5 H. L. 321, 333, 338, 349, 356; *Lysaght v. Edwards*, 2 Ch. D. 499; below, Chap. XI. § 1. And rights given by statute must be recognised and enforced by all Courts, whether of legal or equitable jurisdiction, even though they may confer or create interests unknown or foreign to the previous law; see *Lord Advocate v. Moray*, 1905, A. C. 531.

(*m*) Above, p. 301.

(*n*) See above, p. 267. For exceptions see stats. 45 & 46 Vict. c. 38, ss. 10, 16; 53 & 54 Vict. c. 69, s. 9; Housing of the Working Classes Act, 1890 (stat. 53 & 54 Vict. c. 70), s. 74.

(*o*) *Re Wilton's Settled Estates*, 1907, 1 Ch. 50, 55, in which case, however, a private Act of Parliament had been obtained confirming a contract by a tenant for life to sell at a valuation, and it was held that by virtue of the private

Act the sale was made valid and binding on all parties interested. See above, p. 270.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 4 (1).

(*q*) Sect. 53. As to the duties of trustees for sale, see above, pp. 263 *sq.* As the purchase money may, at the direction of the tenant for life, be invested in real securities, he may well agree, on exercising his statutory power of sale, to leave a proper proportion of the purchase money on mortgage; see above, p. 367, and *n. (c)*: but in such case the trustees of the settlement are not bound to make the investment at the direction of the tenant for life, unless they are satisfied that that direction has been given upon a proper investigation of the title and a proper report as to the value of the proposed security: *Re Hotham*, 1902, 2 Ch. 575.

by the tenant for life, and to have complied with all the requisitions of the Acts (*r*). And this enactment has been held to protect the title of a purchaser, against whom no evidence of want of good faith could be produced, but who had immediately resold at a large increase in price (*s*). This provision, however, does not protect a purchaser who has notice of some improper dealing on the part of the tenant for life. Thus, if the terms of the proposed sale reserve any advantage to the tenant for life personally to the detriment of the remaindermen, the statutory power will not be well exercised, and the vendor's conveyance will be void as an assurance under the Settled Land Acts (*t*). For example, the payment of a commission to the tenant for life would certainly invalidate the sale (*u*); so would a stipulation that the purchaser shall grant to the vendor a lease for years of the lands sold or any part thereof, as the benefit of such a lease would form part of the vendor's own estate, and would go on his death to his executors or administrators, and not to the persons entitled under the settlement. A stipulation in a contract for sale by a tenant for life under the Settled Land Acts that the purchaser shall pay all the vendor's costs and expenses of and incident to the sale, would not appear, as a rule, to avoid the contract; for the vendor's general costs of the sale are not payable out of his own pocket, but are properly discharged out of the purchase money or otherwise out of the capital of the settled property (*x*). But the case is different if the purchaser agree to pay any costs which ought

Stipulation that the purchaser shall pay the vendor's costs of the sale.

(*r*) Sect. 51, also extending, in favour of a person dealing in good faith with the tenant for life, to the case of an exchange, partition, lease, mortgage or charge.

(*s*) *Hurrell v. Littlejohn*, 1904, 1 Ch. 689.

(*t*) See *Sutherland v. Sutherland*,

1893, 3 Ch. 169; *Chandler v. Bradley*, 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*u*) *Chandler v. Bradley*, ubi sup.

(*x*) See *Re Smith's Settled Estates*, 1891, 3 Ch. 65; *Smith v. Lancaster*, 1894, 3 Ch. 439.

properly to be borne by the vendor himself, such as the costs of obtaining the concurrence of mortgagees of the vendor's life estate (*y*). In this case the tenant for life would be stipulating for an advantage to himself at the expense of the remainderman, as the purchase money is obviously decreased by the amount of costs payable by the vendor personally which the purchaser contracts to discharge; and the sale would appear to be void. As we have seen (*z*), where the purchaser has notice of some non-compliance with the conditions of the Acts other than those which forbid the tenant for life to profit at the remainderman's expense, it does not appear that he can rely on the protection given by the enactment last quoted. It should be noted that this enactment only gives relief to a purchaser or other person dealing with the tenant for life, and does not validate, in favour of a subsequent purchaser, an infirm title acquired from the tenant for life by a purchaser or lessee, who had notice of some fact, which made void the attempted exercise of the statutory power (*a*). And further, it appears that if, on a purported exercise by a tenant for life of some power given to him by the Settled Land Acts, he do not comply in all respects with the conditions prescribed by the Acts, any conveyance thereby made is altogether void and not merely voidable, and does not pass the legal estate in the land (*b*); save only when the purchaser, lessee or other person dealing in good

(*y*) See *Cardigan v. Curzon-Howe*, 41 Ch. D. 375; *Re Sir Robert Peel's Settled Estates*, 1910, 1 Ch. 389.

(*z*) Above, p. 302.

(*a*) *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*b*) See Chitty, J., *Cardigan v. Curzon-Howe*, 30 Ch. D. 531, 540; *Re Norton and Las Casas' Contract*, 1909, 2 Ch. 59. In *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599, it was treated as an open

question whether a lease granted under the Acts by a tenant for life to one who knew that the best rent was not reserved was void or voidable: but it is submitted that this view was mistaken, the rule as to the execution of statutory as well as express powers being that, in default of compliance with the terms of a power, any purported exercise thereof is void; see above, pp. 293, 299.

faith with the tenant for life is assisted by the enactment under discussion.

Where the title depends on the exercise by a mortgagee of a power of sale contained or implied in the mortgage deed, the purchaser's counsel must satisfy himself that the power of sale has become so exercisable that a purchaser thereunder will obtain the estate assured free from all equity of redemption or right to set aside the sale. Under the conveyancing practice prior to the year 1882, when powers of sale were usually conferred by the express terms of mortgage deeds, the common form was first to give the mortgagee a general authority to sell at any time after the payment of the principal money secured had become due (*c*), and then to provide, particularly, that the power of sale should not be executed unless and until default should have been made in payment of the money secured at the appointed time, and the mortgagee should have given notice to pay off, and default should have been made in payment for a specified time (*d*) after such notice, or unless or until some interest should have fallen into arrear for a given period (*e*). But in every well-drawn mortgage deed an elaborate clause was inserted exonerating a purchaser from the necessity of seeing or inquiring whether any of the particular cases had arisen in which a sale was authorised, and protecting him against any impropriety or irregularity in the sale (*f*).

Title depending on the exercise of a mortgagee's power of sale.

(*c*) Usually six months after the date of the mortgage.

(*d*) Usually six months.

(*e*) Usually three months.

(*f*) Davidson, *Proc. Conv.* vol. ii. pt. ii. 66 *sq.*, 79, 308—310, 4th ed. The form there given provides that, upon any sale purporting to be made in pursuance of the mortgagee's power of sale, the purchaser shall not be bound to see or inquire whether any of

the particular cases has happened, in which a sale is authorised, or whether default has been made in payment of any principal or interest secured by the mortgage deed at the time appointed for payment thereof, or whether any money remains on the security of the mortgage deed, or as to the necessity or expediency of the stipulations subject to which the sale shall have been made, or otherwise as to the pro-

On a sale by a mortgagee under an express power of sale containing a clause for the purchaser's protection in the common form, the purchaser should, of course, abstain from making requisitions as to any matter on which he is exonerated from the duty of inquiry; for if through his own inquiries or otherwise he obtain notice of some irregularity in the sale, he must have regard thereto, and will no longer be protected (*g*). He must see, however, that sufficient time has elapsed since the date of the mortgage deed for the power of sale to become properly exercisable (*h*); but if this appear to be the case, he need make no further inquiry (*i*). If a power of sale expressly given by a mortgage deed

priety or regularity of the sale; and that, notwithstanding any impropriety or irregularity whatsoever in the sale, the same shall, as regards the safety and protection of the purchaser, be deemed to be within the power and be valid and effectual accordingly, and the remedy of the mortgagor in respect of any breach of the provisions of the mortgage deed conferring the power of sale or any impropriety or irregularity whatsoever in the sale shall be in damages only. Where a mortgage deed contained a similar clause, omitting the words in italics, it was held that a purchaser buying in good faith on a sale purporting to be made in exercise of the mortgagee's power of sale was not bound to inquire whether any money remained owing upon the security of the mortgage deed, and would be protected if the money secured had been paid off at the time of the sale; *Dicker v. Angerstein*, 3 Ch. D. 600.

(*g*) *Parkinson v. Haulbury*, 1 Dr. & Sm. 143; *Selwyn v. Garfit*, 38 Ch. D. 273.

(*h*) *Selwyn v. Garfit*, 38 Ch. D. 273, where mortgage money was made payable and a power of sale given six months after the

date of the mortgage deed; but it was provided that the mortgagee should not execute the power of sale unless and until default should have been made in payment at the time appointed of some principal money or interest secured, and the mortgagee should have given notice to pay off, and default should have been made in payment for three months after such notice; and it was held that a purchaser from the mortgagee purporting to exercise his power of sale seven months after the date of the mortgage deed had notice *ipso facto* that the sale was irregular; for the power could not possibly have become exercisable until three months had expired *after* the mortgage money had become payable, that is, until nine months after the date of the mortgage deed. The sale was therefore set aside on the mortgagor's application, the Court being of opinion that the purchaser was not relieved by a clause for his protection in common form, even though it exonerated him from the necessity of inquiring whether default had been made in payment of the money secured at the time appointed.

(*i*) See note (*f*), above.

contain no clause for the purchaser's protection, he must ascertain not only that the event has occurred in which the power was made exercisable, but also that the mortgage is still subsisting (*k*). The power of sale incorporated by the Conveyancing Act of 1881 in mortgage deeds made after that year (*l*), and since generally relied on in practice, gives to the mortgagee a power of sale when the mortgage money has become due, but provides (*m*) that he shall not exercise such power unless and until (1) notice requiring payment of the mortgage money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the mortgage money or of part thereof for three months after such service (*n*); or (2) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (3) there has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon. This follows the old conveyancing form, except that the power is made exercisable at an earlier period (*o*): but the clause for the purchaser's protection contained in the Act (*p*) is not the same as that usually

Title under
the statutory
power of sale.

(*k*) *Re Edwards to Green*, 58 L. T. N. S. 789.

(*l*) Stat. 44 & 45 Vict. c. 41, ss. 1, 19.

(*m*) Sect. 20.

(*n*) See *Barker v. Illingworth*, 1908, 2 Ch. 20, deciding that, where a notice had been served requiring payment of the principal money secured at the expiration of three calendar months from the date of the notice and warning that in default of such payment the mortgagee would proceed to sell, the mortgagee was entitled to sell on non-payment of the mortgage debt at

the expiration of the three months after the date of the notice.

(*o*) Above, p. 335.

(*p*) Sect. 21 (2), providing that where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised or improper or irregular exercise of

inserted in mortgage deeds under the old practice (*q*). The Act gives no protection to a purchaser until he has obtained a conveyance from the mortgagee in professed exercise of the statutory power of sale; and it does not expressly exempt the purchaser from the duty of inquiring, before conveyance, whether the sale has been properly made. If, therefore, the purchaser make inquiry, before accepting the title, whether any case has arisen to authorise the exercise of the power of sale, the mortgagee will be bound to answer (*r*). But if the purchaser, buying in good faith, refrain from making any such inquiry, he will be protected against any irregularity on obtaining a conveyance. It appears, therefore, that he should, as a rule, abstain from making such inquiries (*s*), and need only satisfy himself that sufficient time has elapsed for the power to have become properly exercisable (*t*). Where a mortgage deed is executed in the usual form, providing for repayment of the money advanced, with interest, six months after the date of the deed (*u*), the earliest time at which the statutory power of sale can become exercisable is eight months after the date of the deed by the interest being two months in arrear. It appears, however, that at any time after a mortgagee's power of sale has become generally exercisable—that is, after the mortgage money has become due (*x*)—the mortgagor or his successors in estate may waive compliance with any particular restriction imposed on the exercise of the power; and in such case the mortgagee can make a good title on an exercise of the powers of sale (*y*). But such waiver, to be effectual, must be given by all persons interested in

Waiver of any particular restriction on the exercise of a mortgagee's power of sale.

the power shall have his remedy in damages against the person exercising the power.

(*q*) Above, p. 335, and n. (*f*).

(*r*) *Life Interest, &c. Corpn. v. Hand in Hand, &c. Socy.*, 1898, 2 Ch. 230.

(*s*) *S. C.*, 1898, 2 Ch. 238;

Bailey v. Barnes, 1894, 1 Ch. 25.

(*t*) Above, p. 336; *Re Thompson and Holt*, 44 Ch. D. 492, 499.

(*u*) *Wms. Real Prop.* 549, 630, 21st ed.

(*x*) Above, p. 337.

(*y*) *Re Thompson and Holt*, 44 Ch. D. 492.

the equity of redemption; thus, if the mortgagor have made a second mortgage, his waiver alone is insufficient (z). And where a mortgagee, selling under his power of sale, asserts that he can make a good title by means of such waiver, the purchaser is entitled and ought to require him to prove that the alleged waiver has been given by all persons interested in the equity of redemption, and at his own expense to procure all such persons to concur in the conveyance in order to confirm the sale. Where one has bought land from a mortgagee selling under the statutory power of sale, the purchaser's counsel should be careful to express in the deed of conveyance that the mortgagee conveys in exercise of the power of sale conferred upon him by the Conveyancing and Law of Property Act, 1881; as this Act only protects a purchaser taking under a conveyance made in *professed* exercise of the power of sale which it confers (a).

Conveyance should be in *professed* exercise of the statutory power of sale.

As a rule, however, the purchaser from a mortgagee selling under his power of sale is not entitled to require the mortgagor's concurrence; that is, supposing the power to have become properly exercisable (b). Where the power of sale is express, the mortgagee can convey to the purchaser such estate as by the joint operation of the mortgage and the power he has been effectually authorised to convey free from equity of redemption; but if this do not comprise the entire fee simple or other estate sold, the purchaser is, of course, entitled to object to the title, and may require the concurrence of all other necessary parties (c). A mortgagee selling under the power of sale given by the Conveyancing Act of 1881 is enabled to convey the property sold by deed

Mortgagor's concurrence cannot be required.

What estate the mortgagee can convey.

(z) *Schwyn v. Garfit*, 38 Ch. D. 273. 346, n.; *Corder v. Morgan*, *ibid.* 344; Sug. V. & P. 396, 14th ed.

(a) Above, p. 337, and n. (p).

(c) See above, pp. 164—166.

(b) *Clay v. Sharpe*, 18 Ves.

Copyholds.

for such estate and interest therein as is the subject of the mortgage (*d*). This does not empower a mortgagee who has acquired an equitable interest only in the property mortgaged to convey the legal estate therein on an exercise of the statutory power of sale (*e*), or a mortgagee of leaseholds by way of underlease to convey the original term (*f*). The Act provides (*d*) that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed exercising the mortgagee's power of conveyance thereby conferred, unless the deed is otherwise sufficient in that behalf in law or by custom. When, therefore, a mortgage of copyholds has been made in the form now usual, by a deed of covenant to surrender incorporating the statutory power of sale, followed by a conditional surrender to the use of the mortgagee (*g*), and the mortgagee has sold the legal interest under his power of sale, he must, in order to confer upon the purchaser the legal title to be admitted tenant on the court rolls (*h*), either procure the mortgagor to surrender to the purchaser's use, or himself be admitted and then execute a like surrender (*i*). The same course is necessary when a mortgagee of copyholds sells under an express power of sale (*i*).

Title under
the power of
sale given to
mortgagees
by Lord
Cranworth's
Act.

The power of sale given to mortgagees by Lord Cranworth's Act (*k*) may have been or may be well exercised after the year 1881, notwithstanding the repeal of the provisions of that Act by the Conveyancing Act of 1881 (*l*). The former Act affords the

(*d*) Stat. 44 & 45 Vict. c. 41, s. 21 (1).

(*e*) *Re Hodson and Houes' Contract*, 35 Ch. D. 668.

(*f*) See *Re Deighton and Harris' Contract*, 1898, 1 Ch. 458; above, p. 184, and n. (*h*).

(*g*) *Wms. Real Prop.* 564—566, 21st ed.; Davidson, *Prec. Conv.* vol. ii. pt. ii. 113 sq., 4th ed.; 2

Key & Elphinstone, *Prec. Conv.* 79—82, 4th ed.; 72—74, 8th ed.

(*h*) See above, p. 163.

(*i*) Davidson, *Prec. Conv.* vol. ii. pt. i. 407—411, and pt. ii. 116, 4th ed.; and see *Hall v. Bromley*, 35 Ch. D. 642.

(*k*) Stat. 23 & 24 Vict. c. 145, ss. 11—24, 34.

(*l*) Stat. 44 & 45 Vict. c. 41,

like protection to purchasers when a sale has been effected in professed exercise of the powers thereby conferred (*m*) as the latter statute gives when a conveyance has been made in professed exercise of the power of sale which it provided (*n*). Lord Cranworth's Act (*o*), however, empowered a mortgagee exercising the power of sale thereby conferred to convey or vest the property sold to or in the purchaser for all the estate and interest therein which the *mortgagor* had power to dispose of, and so enabled a mortgagee of leaseholds by demise to convey the original term (*p*), and a mortgagee who had obtained an equitable charge only on freeholds to assure the legal estate therein (*q*). The Act provides, however, that in the case of copyholds, the beneficial interest only shall be conveyed to and vested in the purchaser by a mortgagee selling thereunder; so that if the mortgagee sell the legal interest he must obtain for the purchaser the legal right to be admitted tenant on the rolls by procuring a surrender to be made to his use in the usual way (*r*).

Conveyance by mortgagee selling under Lord Cranworth's Act.

A mortgagee, in exercising his power of sale, does not stand in a fiduciary relation to his mortgagor (*s*). His only obligations are to observe the terms of the power and to act in good faith (*t*). He is bound to sell fairly, and to take reasonable steps to obtain a proper price; and for this reason and because his authority is to *sell* and not to make himself full owner of the mortgaged property, he cannot sell to himself or to a

Mortgagee selling under power of sale bound only to act in good faith.

s. 71; *Re Solomon and Meagher's Contract*, 40 Ch. D. 508; *Re Boucherett*, 1908, 1 Ch. 180, 184; and see Williams' Conveyancing Statutes, 251—253.

(*m*) Stat. 23 & 24 Vict. c. 145, s. 13.

(*n*) Above, p. 337, and n. (*p*). Note the difference in the language.

(*o*) Sect. 15.

(*p*) *Hiatt v. Hillman*, 19 W. R. 694.

(*q*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

(*r*) Above, p. 340.

(*s*) *Warner v. Jacob*, 20 Ch. D. 220.

(*t*) *Kennedy v. De Trafford*, 1896, 1 Ch. 762; 1897, A. C. 180; *Nutt v. Easton*, 1899, 1 Ch. 873; 1900, 1 Ch. 29.

trustee or an agent for himself, or rightly pursue any scheme for getting the property into his own hands under the guise of sale (*u*); but he may proceed to a forced sale for the purpose of paying the mortgage debt (*x*). He need not sell by auction, unless of course he should have been specially restricted to this mode of sale by the terms of his power (*y*). For example, the Court has upheld a sale by a mortgagee to one of two mortgagors, who were tenants in common, for the exact amount owing for principal, interest and costs, the bulk of the purchase money being allowed to remain on mortgage, when it appeared that the mortgagee had acted in perfect good faith, having refrained from putting the property up to auction on a surveyor's advice that it would be unlikely to realise the amount owing, and having advertised in vain for another purchaser by private contract (*z*). On the other hand, a sale by the transferee of a mortgage, immediately after the transfer, for the exact sum paid for principal and interest on taking the transfer, was set aside, as between the parties to this sale and the persons entitled to the equity of redemption, when it was shown that the transferee of the mortgage had been a mere nominee of the purchaser and there had been no *bonâ fide* exercise of the power of sale. The purchaser, however, having mortgaged the property and resold the equity of redemption prior to the commencement of the proceedings to set aside the sale to her, and the purchaser of the equity of redemption having taken a transfer of this mortgage after he had notice of such proceedings,

Kennedy v.
De Trafford.

Bailey v.
Barnes.

(*u*) *Downes v. Grazebrook*, 3 Mer. 200; *Robertson v. Norris*, 1 Giff. 421; 4 Jur. N. S. 155, 443; *National Bank of Australasia v. United, &c. Co.*, 4 App. Cas. 391; *Martinson v. Clowes*, 21 Ch. D. 857, aff. 1885, W. N. 41; *Hodson v. Deans*, 1903, 2 Ch. 647; see below, Chap. XVII.

(*v*) *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 398; *Bailey v. Barnes*, 1894, 1 Ch. 25, 32.

(*y*) *Kennedy v. De Trafford*, 1896, 1 Ch. 762, 767; 1897, A. C. 180, 185.

(*z*) *Kennedy v. De Trafford*, ubi sup.

and having proved that he had no notice at the time of his purchase of the equity of redemption of the circumstances attending the prior sale, it was held that he was not affected with constructive notice of these circumstances or of any imperfection in the prior sale, owing to the facts apparent on the face of the title or by reason of his omission to make inquiry as to the validity of the prior sale; and it was decided that he was entitled to tack the equity of redemption which he had purchased to the legal estate acquired by him under the transfer of the mortgage, and so exclude the equity of the persons originally entitled to redeem to set aside the prior sale (*a*). A mortgagee may well exercise his power of sale, notwithstanding that he has been in possession of the mortgaged property for a length of time sufficient to bar the mortgagor's equity of redemption under the Statutes of Limitation; and this is also the case where the mortgage has been made, not in the form now usual of a conveyance with power of sale, but in the form of a conveyance on trust for sale (*b*). It appears too that a mortgagee may well exercise his power of sale after he has obtained an order for foreclosure absolute (*c*); and his right to exercise this power is not affected by the mere commencement of proceedings either by himself to obtain foreclosure, or by the mortgagor for redemption (*d*). But when the mortgagee has obtained an order for foreclosure *nisi*, giving the mortgagor the usual time within which to redeem, or the mortgagor has obtained the common order for redemption (*e*), the mortgagee may not exercise his power of sale without leave of the Court, so long as the

Sale by mortgagee in possession after mortgagor's title barred.

Sale after foreclosure absolute.

Sale pending foreclosure or redemption proceedings.

(*a*) *Bailey v. Barnes*, 1894, 1 Ch. 25.

(*b*) See *Locking v. Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284, 290, 295.

(*c*) See *Stevens v. Theatres, Ltd.*,

1903, 1 Ch. 857, 862, 863.

(*d*) *Adams v. Scott*, 7 W. R. 213; *Stevens v. Theatres, Ltd.*, 1903, 1 Ch. 857, 861.

(*e*) See 3 Seton on Judgments.

1895, 1926, 6th ed.

right of redemption so reserved to the mortgagor remains open. The power is, however, not destroyed but merely suspended during this period, and if the mortgagee do exercise it within that time in favour of a purchaser taking without notice of the order, it appears that the latter will get a good title (*f*). But if the purchaser have express notice of any foreclosure or redemption proceedings or any such proceedings be registered as a *lis pendens*, the purchaser will be bound by them and must see that no order suspending in effect the exercise of the mortgagee's power of sale has been made or is still subsisting (*g*).

Sale by the mortgagee's attorney.

Re Dowson and Jenkins's Contract.

A mortgagee entitled to exercise the statutory power of sale (*h*) may well do so by attorney : but any power of attorney given for this purpose must expressly confer either a general authority to sell all property vested in the principal by way of mortgage or a special authority to exercise the mortgagee's power of sale in respect of some particular mortgaged property (*i*). A power to sell any real or personal property belonging to the principal is not sufficient to authorise the attorney to sell property, of which the principal is only a mortgagee entitled to exercise the statutory power of sale (*k*). And though such a power of attorney authorise the attorney to receive and give receipts and discharges for all moneys due to the principal, that does not constitute the attorney "a person for the time being entitled to receive and give a discharge for the mortgage money" within the meaning of sect. 21, sub-sect. 4 of the Conveyancing Act of 1881 (*l*), and so enable him to exercise a mortgagee's

(*f*) *Stevens v. Theatres, Ltd.*, 1903, 1 Ch. 857.

(*g*) See below, Chap. XII., § 2.

(*h*) Above, p. 337.

(*i*) C. A., *Re Dowson and Jenkins's Contract*, 1904, 2 Ch. 219, 224, 225.

(*k*) *Re Dowson and Jenkins's Contract*, 1904, 2 Ch. 219.

(*l*) Stat. 44 & 45 Vict. c. 41, authorising any person so entitled to exercise the power of sale conferred on mortgagees by that Act.

statutory power of sale vested in his principal; for these words of the Act do not extend to a person entitled as an agent only to give a receipt and discharge (*m*). The like rule applies, of course, to express powers of sale worded in terms similar to those of the statute.

When property is purchased, to which a mortgagee has become entitled under a decree of foreclosure absolute (*n*), care must be taken to ascertain that there were not any circumstances, attending the making of the order, which would induce the Court to re-open the foreclosure (*o*).

Purchase of
foreclosed
property.

(*m*) See note (*k*), p. 344.

(*n*) Wms. Real Prop. 557, 558, 21st ed.

(*o*) See *Campbell v. Holyland*, 7 Ch. D. 166; 1 Dart, V. & P. 468, 6th ed.; 478, 7th ed.

CHAPTER X.

OF PARTICULAR TITLES.

- § 1. Sale of Copyholds.
- § 2. Sale of Leaseholds.
- § 3. Sale of lands in a Register County or Compulsory Registration District.
- § 4. Voluntary Conveyances.
- § 5. Sale of Ground Rents, Reversions and Remainders, Mines, Roads, Rivers, &c.
- § 6. Sale of purely Incorporeal Hereditaments.
- § 7. Sale of Charity Lands.
- § 8. Sale of Partnership Property.
- § 9. Sale by Order of the Court.
- § 10. Sale of an Equity of Redemption.
- § 11. Sale of Licensed Property.
- § 12. Land subject to Restrictive Covenants.
- § 13. Investigation of Title in view of a Mortgage.

§ 1.—*Sale of Copyholds.*

Copyholds. ON the sale of copyholds, the purchaser, in the absence of special stipulation, is equally entitled to have the whole legal and equitable estate vested in him as in the case of freeholds (*a*). In copyholds, however, what comes under the head of the legal estate is the tenancy of the lands sold on the court rolls of the manor of which they are held, for the customary estate comprised in the contract for sale; and what the vendor has to prove is that he can confer this right. He will have

(*a*) Above, p. 163; *Re Wilson's and Stevens's Contract*, 1894, 3 Ch. 546, 549.

discharged his obligation if he show either that he is himself the tenant on the rolls of such an estate, and so can surrender the same to the purchaser's use, or that he can, by the exercise of a power of appointment, give the purchaser a direct right to be admitted of such an estate, or that some other person is such a tenant, and that he (the vendor) is entitled to call upon that tenant to surrender to the use of the purchaser (*b*). It must be borne in mind, however, that if there is no tenant upon the rolls, and the vendor cannot by appointment give the purchaser a direct right to be admitted, the vendor must, at his own expense, procure a tenant to be admitted who shall be able to execute the necessary surrender to the purchaser. And for this purpose the vendor must himself pay all fines due to the lord in consequence of such admittance (*c*). For example, if A., a tenant of copyholds in customary fee, devise them to B. and C. on trust for sale, and these devisees after A.'s death sell them to D., B. and C. cannot at once give D. the right to be admitted, but must themselves first be admitted tenants on the rolls; after which they will be enabled to execute such a surrender to D.'s use as will give him the legal right to be admitted. But if A.'s will had contained a power (as distinct from a trust) for B. and C. to sell his copyholds, or if A. had devised his copyholds to such uses as B. and C. should appoint for the purpose of giving effect to any sale made by them under the trust declared in that behalf, then, if B. and C. were to sell to D. before the lord had seized *quousque* for want of a tenant, D. would be entitled to claim admittance directly as being in fact the person entitled under A.'s will (*d*). It must be

(b) Above, pp. 164—166.

(c) See *Bradley v. Manton*, 16 Beav. 294; *Paramore v. Green-slade*, 1 Sm. & Giff. 541; *Whiteley v. Taylor*, 35 L. T. N. S. 187;

Re Thames Tunnel, &c. Act, 1900, [1908] 1 Ch. 493.

(d) *Glass v. Richardson*, 9 Hare, 698, 2 De G. M. & G. 658; *R. v. Wilson*, 3 B. & S. 201; *Sug.*

remembered that the lord is entitled to exact the fine due by the custom on every change in the tenancy of lands held of him by copy of court roll. Thus, if A., tenant of copyholds in customary fee, die intestate leaving B. his heir, and B. die intestate without having been admitted and leaving C. his heir, and then C. sell the land to D., C. must, as we have seen, procure himself to be admitted in order to give to D. the title promised by the contract. But in order to procure his admittance, C. will have to pay a double fine, namely, that due on the devolution of the estate from A. to B. as well as that payable on his own admission as B.'s heir (*e*). The lord is not, however, entitled to any fine by reason of the devolution of any equitable estate or interest in lands holden of him by copy; he is only concerned with the changes in the legal tenancy upon the court rolls (*f*). So that if A., tenant of copyholds, sell them to B. and surrender to B.'s use, and B., without being admitted, sell the lands to C., and C., remaining unadmitted, sell to D., there is no need for either B. or C. to be admitted in order to complete C.'s contract with D., but C. can call upon A., who has remained the tenant upon the rolls, to surrender to D.'s use, and upon the execution of such surrender D. will be entitled to be admitted on payment of a single fine. If A. had died, his heir or devisee (*g*) would have to be admitted at C.'s expense in order to surrender to D.; but the only fine payable by C. would be that incurred by the admission of A.'s heir or devisee (*h*).

V. & P. 562; Davidson, *Prec. Conv.* vol. ii. pt. i. p. 375, n., 4th ed., vol. iv. p. 82, n., 3rd ed.; Wms. *Real Prop.* 494, 21st ed.

(*e*) *Morse v. Faulkner*, 1 Anst. 11, 13; *Morris v. Clarkson*, 3 Swanst. 558, 563, 566; *Watson, B., Garland v. Alston*, 3 H. & N. 290, 393, 395; *Londesborough v.*

Foster, 3 B. & S. 805; 1 Scriv. Cop. 383, 405, 3rd ed.

(*f*) *Hall v. Bromley*, 35 Ch. D. 642.

(*g*) See above, pp. 216, 217, 221, 222.

(*h*) 1 Scriv. Cop. 404, 3rd ed.; *Garland v. Alston*, 3 H. & N. 393; *Hall v. Bromley*, ubi sup.

If A. sell and surrender copyholds to the use of B. and his heirs and B. die intestate before being admitted, then under the Land Transfer Act, 1897 (*i*), B.'s equitable estate in the land would vest in his administrator, who would thus have the right to be admitted (*k*). It is a question whether the administrator claiming to be admitted under A.'s surrender would have to pay a single or a double fine (*l*). But as A. remains the lord's tenant on the rolls until some one else is admitted (*k*), and would be a trustee for B. and his heirs, it appears that B.'s administrator might call upon A. to surrender to his use, and might well claim to be admitted under this surrender on payment of a single fine (*m*). And if in the case put B.'s administrator, before being admitted, convey his estate in the copyholds to B.'s heir (*n*), it appears that B.'s heir will then

Fines on admittance after the death of an unadmitted surrenderee.

(*i*) Stat. 60 & 61 Vict. c. 65, s. 1 (1); above, pp. 228, 229, 235.

(*k*) See *Payne v. Barker*, O. Bridg. 18, 21—25, 33; *Doe d. Tofield v. Tofield*, 11 East, 246, 250; 1 Wat. Cop. 307 and n. (2), 4th ed.; Wms. Real Prop. 485, 21st ed.

(*l*) In 1 Wat. Cop. 364, n. (1), and 1 Scriv. Cop. 404, 405, 3rd ed., the opinion is expressed that the heir of an unadmitted surrenderee is entitled to be admitted on payment of a single fine; and this opinion appears to be fortified by the rule laid down in *Hall v. Bromley*, 35 Ch. D. 642. Mr. Elton, however, asserted that if the surrenderee die before admittance his heir must pay two fines; Elton on Copyholds, 169 (182, 2nd ed.): but the authorities cited (in the 2nd ed. only) contain nothing to support this view. In *Garland v. Alston*, 3 H. & N. 390, 395, Watson, B., said that, if the heir is entitled only on the ground that the ancestor was entitled to be admitted, and the lord could have compelled the ancestor to come

in and pay his fine on admittance, the heir must pay a double fine. These conditions are not fulfilled in the case of the heir of an unadmitted surrenderee; since the lord could not have compelled the ancestor to come in and be admitted, the tenancy continuing to be full in the person of the surrenderor. It is thought that the case of the heir of an unadmitted surrenderee is distinguishable from that of an heir claiming a copyhold tenement by descent after the death and intestacy of an unadmitted heir of an admitted tenant, who also died intestate; see above, pp. 348, and n. (*e*), 349, n. (*k*).

(*m*) This appears to follow from the decision in *Hall v. Bromley*, ubi sup. But of course if the administrator took and obtained admittance upon a surrender to him from A. his legal title would date from that surrender only and would not relate back to the surrender from A. to B.; see Wms. Real Prop. 486, 21st ed.

(*n*) See above, pp. 230, 233.

Devise by an
unadmitted
surrenderee.

be entitled to be admitted, and no fine will be payable in respect of the conveyance from the administrator to the heir (*o*). But if B. had devised his estate in the copyholds or appointed executors by his will, it appears that his executors, taking under the Land Transfer Act, 1897, or his devisee in case the executors assented to the devise (*p*), could only be admitted on payment of a double fine; since the Wills Act provides that, where a testator was entitled to be admitted to any real estate of the nature of copyholds and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate *in consequence of such will* shall be entitled to be admitted to the same except on payment of all such stamp duties, fees, fine and sums of money as would have been payable in respect of the admittance of the testator thereto and his subsequent surrender thereof to the use of his will, in addition to the stamp duties, fine, &c. payable on the admittance of the person so entitled or claiming (*q*).

§ 2.—*Sale of Leaseholds.*

Leaseholds.

The principal duties of a conveyancer advising a purchaser of leasehold land have been already noticed (*r*). He must see that the lease or term offered by the abstract corresponds at all points with that offered by the contract. The purchaser is entitled to require the assignment to him of a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale (*s*). And it is now settled that,

(*o*) See *Hall v. Bromley*, 35 Ch. D. 652.

(*p*) See above, pp. 228—230, 233, 235.

(*q*) Stat. 7 Will. IV. & 1

Vict. c. 26, s. 4; *Londesborough v. Foster*, 3 B. & S. 805.

(*r*) Above, pp. 100, 101, and n. (*i*), 163, 164, 176.

(*s*) Above, p. 101, n. (*i*).

notwithstanding the general rule that notice of a document is notice of its contents (*t*), a purchaser of leasehold land is entitled to object to the title if the covenants contained in the lease are more onerous or stringent than those usually inserted in leases of like character to that purchased, unless the existence of such covenants were brought to his notice at the time of entering into the contract, either through express mention therein or through his having been afforded an opportunity of inspecting the contents of the lease (*u*). So we have seen that the existence of a considerable ground rent not mentioned in the particulars on the sale of houses held for a long term of years may be an objection to the title (*x*). A stipulation is frequently made on the sale of leaseholds by auction that the lease will be produced at the sale and may be inspected at the office of the vendor's solicitors at any time within a week previously to the sale, and that any purchaser shall be deemed to have full notice of the contents of the lease, whether he avail himself of the opportunity of inspection or not (*y*). A purchaser of leaseholds buying under such a stipulation as this cannot, of course, object to anything contained in the lease (*z*); unless, indeed, an actual misrepresentation has been made by the vendor, in the particulars of sale or otherwise, as to the contents of the lease (*a*).

When the property purchased is held for a term of years determinable by re-entry for non-payment of rent

Evidence that a lease held subject to a

(*t*) Above, p. 215.

(*u*) *Reeve v. Berridge*, 20 Q. B. D. 523; *Midgley v. Smith*, 1893, W. N. 120; *Re White and Smith's Contract*, 1896, 1 Ch. 637; *Molyneux v. Hawtrey*, 1903, 2 K. B. 487; see also *Nouaille v. Flight*, 7 Beav. 521; *Re Davis to Carey*, 40 Ch. D. 601; above, p. 205. This is so even though the contract provide that the vendor's title

shall be accepted: *Re Harducke and Lipski's Contract*, 1901, 2 Ch. 666.

(*x*) Above, pp. 175, 176.

(*y*) 1 Key & Elph. Prec. Conv. 270, 4th ed.; 259, n. (*e*), 8th ed.

(*z*) See *Laurie v. Lees*, 14 Ch. D. 249, 252, 257.

(*a*) See *Van v. Corpe*, 3 My. & K. 269; *Flight v. Barton*, ib. 282; above, p. 199.

condition of
re-entry has
not deter-
mined.

or breach of covenant (*b*), it is, of course, important to ascertain that no cause of forfeiture under the condition of re-entry has occurred. Before the year 1882, the purchaser in such a case was entitled, in the absence of stipulation to the contrary, to require evidence that all the covenants and conditions in the lease had been duly performed and observed up to the date of the actual completion of the contract (*c*). It was, however, usually stipulated that production of the receipt for the last payment of rent due before the completion of the sale should be conclusive evidence of this (*d*). At the present time, the purchaser's rights in this respect are regulated, in the absence of special stipulation, by the following provision of the Conveyancing Act of 1881 (*e*):—Where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase. This provision is less stringent than the special stipulation previously usual, which was construed as obliging the purchaser to accept the title, notwithstanding the existence of a continuing breach of the covenants in the lease (*f*). The stipulation contained in the Act only binds the purchaser to assume, unless the contrary shall appear, that the covenants have been performed, and does not preclude him from objecting to the title on the ground that a cause of forfei-

(*b*) Wms. Real Prop. 337, 513, 21st ed.

(*c*) 1 Davidson, Prec. Conv. 536, 4th ed.; *Palmer v. Goren*, 25 L. J. Ch. 841.

(*d*) 1 Davidson, Prec. Conv. 537, 624, 648 and n. (*y*), 4th ed.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 3 (4).

(*f*) See *Bull v. Hutchens*, 32 Beav. 615; *Lawrie v. Lees*, 14 Ch. D. 249; 7 App. Cas. 19, 30—33, 37—39, 42.

ture has occurred, if it appear that a breach of covenant has in fact been committed and has not been waived (*g*). Receipt of rent by a landlord is a waiver of forfeiture for breaches of covenant which have occurred and been brought to his notice before the rent became due (*h*): but it is not a waiver on account of breaches of which he had no notice (*i*), or subsequent breaches (*k*). Production of a receipt for rent is not, therefore, in itself complete evidence of any waiver of a breach of covenant. But a purchaser buying under the present statutory stipulation must, on production of the last receipt for rent in accordance therewith, assume (unless the contrary appear) that the covenants have been duly performed, not only prior to the receipt of rent, but up to the date of actual completion of the purchase. It has been decided that the statutory stipulation does not apply where the land sold is held under a lease for years at a peppercorn rent, or indeed at any other rent in kind and not in money; in which case the purchaser has the same right to require strict evidence of the performance of the lessee's covenants as in the case of an open contract made before the year 1882 (*l*).

Waiver of forfeiture by receipt of rent.

We have seen (*m*) that if a man buy land with notice, either oral or written but not contained in the contract for sale, that a good title cannot or will not be made,

Purchaser buying leaseholds with notice of a breach of

(*g*) *Re Highett and Bird's Contract*, 1902, 2 Ch. 214; 1903, 1 Ch. 287.

(*h*) *Bridges v. Longman*, 24 Beav. 27, 30; *Davenport v. The Queen*, 3 App. Cas. 115; *Jacob v. Down*, 1900, 2 Ch. 156.

(*i*) *Pennant's Case*, 3 Rep. 64; *Ewart v. Fryer*, 1901, 1 Ch. 499, 502, 511; *S. C.*, *nom. Fryer v. Ewart*, 1902, A. C. 187; *Matthews v. Smallwood*, 1910, 1 Ch. 777, 786 *sq.*

(*k*) See *Marsh v. Curteys, Cro. Eliz.* 528; 3 Rep. 65 a; *Price v. Wortwood*, 4 H. & N. 512.

(*l*) *Re Moody and Yates' Contract*, 28 Ch. D. 661; 30 Ch. D. 344. In this case there was a covenant to finish a house within six months to the satisfaction of the lessor's surveyor, and it was held that the surveyor's certificate to this effect was a part of the vendor's title, and that the expense of procuring the same was therefore not payable by the purchaser under sect. 3 (6) of the Conveyancing Act of 1881; see above, pp. 33, 105, 121, 136.

(*m*) Above, p. 203.

covenant that
cannot or
will not be
remedied.

*Re Highett
and Bird's
Contract.*

the vendor is exonerated from showing title to the extent indicated by the notice, unless he should have *expressly* agreed by the contract for sale to show a good title. It follows, therefore, that if one buy leasehold land with notice so given to him that there has been a breach of covenant, which cannot or will not be remedied by the vendor, he is precluded, unless the contract contain an *express* stipulation that the vendor shall show a good title, from requiring the evidence, to which he would otherwise be entitled, that the covenant in question has been duly performed. Thus, where houses held under a repairing lease are obviously dilapidated and the purchaser agrees, outside of the written contract, to take them as they are, it is thought that he could not insist on the vendor furnishing evidence of his performance of the covenant to repair. The rule in question, though perfectly well established, was, however, unaccountably overlooked both by the vendor's counsel, by Swinfen Eady, J., and by the Court of Appeal in the case of *Re Highett and Bird's Contract* (n). In that case the purchaser bought under an open contract a leasehold house, which was obviously out of repair, and *the vendor accepted a reduced price in consequence*. Before the title was accepted, the vendor was served with a "dangerous structure" notice from the London County Council under the London Building Acts, 1894 and 1898, requiring him to pull down or render secure a part of the house. The notice not being complied with, a police court order was made requiring him to do the repairs within fourteen days. This order was made before, but not served on the vendor till after the acceptance of the title. The vendor, who had produced the receipt for the last quarter's rent (o), took out a vendor and purchaser summons for a declaration that

(n) 1902, 2 Ch. 214 ; 1903, 1 Ch. 287.

(o) Above, p. 352.

he had shown a good title, and that the expense of complying with the police court order was an out-going (*p*) which ought to be borne by the purchaser. The vendor's counsel mainly contended that this expense had not ripened into a charge or liability until after the proper time for completion (*p*), and that under the Conveyancing Act, 1881 (*q*), production of the last receipt was conclusive evidence of performance of the covenant to repair. It was held (and in this respect, no doubt, rightly) that under the statutory stipulation such production is only evidence *primâ facie* of performance of the covenant, and that the purchaser is not obliged to accept it as conclusive where he has notice of a breach of the covenant. It was, however, decided in both Courts that the vendor was under an obligation to prove that the covenant to repair had been performed, and was *for this reason* bound to defray the expense of complying with the notice and order; and the Courts declined to consider at what time this liability became a charge. But it is submitted that this decision cannot be supported on the ground so assigned for it. The Courts rested their judgment on the supposed authority of the case of *Barnett v. Wheeler* (*r*). That case, however, was an action of *assumpsit* by a purchaser, in which the declaration stated a sale of leaseholds on the express condition that the vendor should make a good title, and was argued on demurrer to a plea that the vendor made a good title in all respects except as to compliance with a covenant to repair, and that the purchaser knew that the property sold was out of repair. It was considered that the plea was bad, but Parke, B., particularly mentioned that there was an express contract to make a good title. This accords with the rule stated above (*s*). As already

(*p*) See above, p. 50, and below,
Chap. XI.

(*q*) Above, p. 352.

(*r*) 7 M. & W. 364.

(*s*) Pp. 203, 354.

mentioned, this rule was not brought to the notice of either Court in *Re Highett and Bird's Contract*, nor were any of the authorities cited by which it is established. No doubt under an open contract for the sale of leaseholds, without more, the vendor is bound to prove that there is no liability to forfeiture by reason of the non-performance of a covenant to repair (*t*) ; and this may be the case notwithstanding that the property is obviously out of repair, for it may be contemplated that the vendor shall perform the covenant before completion (*u*). But where a vendor is induced to accept a lower price than he would otherwise take on account of the property being out of repair, it is submitted that the parties plainly intend to waive all objection to the title caused by the non-performance of a covenant to repair, and must be taken to have contracted on that footing. This view appears to have commended itself to Lord Justice Romer, who explained in a subsequent case (*x*), that *Re Highett and Bird's Contract* was decided on the footing that the vendor was in the same position as if he had expressly agreed to make a good title ; and declared that that case was not to be taken as an authority for any case in which there is not an express contract by the vendor to make a good title. To avoid all question, however, of the application of the decision above criticised, a vendor selling houses held under a repairing lease should be most careful to stipulate expressly in the contract for sale that the purchaser shall be deemed to have notice of the actual state and condition of the property, and shall take the houses as they are. And a vendor of leaseholds should always employ an express stipulation, such as was generally used before the Conveyancing Act, making production of the last receipt for rent *conclusive* evidence of the

(*t*) Above, p. 352.

(*u*) See 7 M. & W. 366, 367.

(*x*) *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226, 231.

performance of all covenants, and providing further, if necessary, that the person giving such receipt, though not the original lessor, shall be assumed to be the reversioner or his agent (*y*). In default of this last proviso, the vendor would have to prove that the giver of the receipt, if not the lessor, was the reversioner or his agent.

Where land held by underlease is sold as such, the purchaser cannot of course reject the title because he is not getting a term granted by a lease from the freeholder; but he has the same right as the purchaser of such a lease to object to the title on the ground of liability to unusually onerous covenants not brought to his notice at the time of sale (*z*). Where the underlease sold and the superior lease are both determinable by re-entry for non-payment of rent and breach of covenant, it is of course material to the title to show that no cause of forfeiture of either has occurred. And where the head lease includes other lands than those demised by the underlease, it is important to ascertain that no forfeiture of the head lease has been incurred through omission to comply with the head lessee's covenants relating to such other lands (*a*). Under the Conveyancing Act of 1881 (*b*), a provision similar to that considered above is implied, in the absence of stipulation to the contrary, in contracts made after the year 1882 for the sale of land held by underlease; the purchaser being bound to assume, unless the contrary appears, on production of the receipt for the

Sale of land held by underlease.

(*y*) Above, pp. 79, 352, 353.

(*z*) Above, p. 351, and cases cited in n. (*u*) thereto; *Hyde v. Warden*, 3 Ex. D. 72.

(*a*) See *Deane v. Goodman*, 1907, 1 K. B. 612; 1908, 1 K. B. 94; 1909, A. C. 72, deciding that, in case of such a forfeiture, the underlessee has no remedy against

the assigns of the underlessor under covenants by him to perform and to indemnify the underlessee against the covenants of the head lease relating to other lands than those comprised in the underlease.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 3 (5, 9, 10, 11).

last payment due for rent under the underlease before the date of actual completion of the purchase, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date. It has been held that the vendor of an underlease does not comply with this provision by producing a receipt given by the superior landlord for rent paid to him by the vendor under threat of distress; what is required is the receipt for the rent due under the underlease (*c*). Where the receipt for the rent last due under the underlease had been produced, but it appeared that the superior landlord had brought, though he had practically ceased to prosecute, an action to recover possession of the premises on the ground of breach of covenant to repair, it was held that the purchaser must accept, as sufficient proof that the covenants in the superior lease had been performed, an affidavit by the vendor that he had been in possession of the premises without any other disturbance than the above, that he had repaired the premises, and that, to the best of his knowledge and belief, the covenants had been performed (*d*). As already mentioned, it is desirable for a vendor of land held by underlease to stipulate expressly that the last receipt for rent thereunder shall be conclusive evidence of the performance of the covenants and conditions of the underlease and of every superior lease, and also, where necessary, that the giver of the receipt shall be assumed to be the reversioner or his agent (*e*).

Sale of leaseholds not

When leaseholds are sold, which are subject to a

(*c*) *Re Higgins and Percival*,
1888, W. N. 172.

(*d*) *Ringer to Thompson*, 51 L. J.
Ch. 42.

(*e*) Above, pp. 80, 357.

covenant not to assign without the landlord's licence (*f*), the vendor is bound to procure such licence at his own expense, and if he fail to do this, he will not have shown a good title and will have broken the contract (*g*). But it appears that the procuring of the necessary licence is at first to be treated as a matter of conveyance rather than of title (*h*), and the purchaser cannot object to the title on the ground of the absence of any licence to assign, if the vendor procure such licence before the day fixed for completion (*i*). If such property be sold under an express stipulation that the sale is subject to the landlord's approval or to his consent to the assignment, the vendor is still bound to use his best endeavours to procure the necessary licence; and if he do this and the licence be refused, he will be discharged from his contract (*k*). If, on the other hand, he fail to

assignable
without the
landlord's
licence.

(*f*) See Wms. Real Prop. 508, 509, 515, 21st ed. By stat. 55 & 56 Vict. c. 13, s. 3, agreements in leases against assigning or underletting without licence shall, unless the lease contain an express provision to the contrary, be deemed to be subject to a proviso that no fine shall be payable for such licence. It has been held that this enactment does not make the payment of such a fine an illegal payment; so that if a fine be voluntarily paid, it cannot be recovered back. But if the lessor refuse to give the licence except on payment of a fine, the lessee may lawfully assign or underlet without the licence: see *Waite v. Jennings*, 1906, 2 K. B. 11; *Jenkins v. Price*, 1907, 2 Ch. 229, 233, 234, reversed on other grounds, 1908, 1 Ch. 10; *Andrew v. Bridgman*, 1908, 1 K. B. 596. So if a lease contain a covenant not to assign without the lessor's licence, such licence not to be unreasonably withheld, and the lessor do unreasonably refuse his licence to assign, the lessee may lawfully assign the

demised premises without the licence: *Bates v. Donaldson*, 1896, 2 Q. B. 241; *Jenkins v. Price*, ubi sup. But he has no right of action against the lessor to recover damages for unreasonably refusing the licence: *Treloar v. Bigge*, L. R. 9 Ex. 151; *Sear v. House Property, &c. Society*, 16 Ch. D. 387. He may, however, bring an action against the lessor for a declaration that he is entitled to assign without licence: *Young v. Ashley Gardens, &c.*, 1903, 2 Ch. 112. This case was not cited in *Jenkins v. Price*, ubi sup., where Swinfen Eady, J., considered that the lessee ought not to have the costs of bringing such an action. But this ruling was followed by Eve, J., in *Evans v. Levy*, 1910, 1 Ch. 453.

(*g*) *Bain v. Fothergill*, L. R. 7 H. L. 158.

(*h*) See above, pp. 164—166.

(*i*) *Monro v. Taylor*, 3 Mac. & G. 713, 714, 722; *Ellis v. Rogers*, 29 Ch. D. 661; *Day v. Singleton*, 1899, 2 Ch. 320, 327; and see *Smith v. Butler*, 1900, 1 Q. B. 694.

(*k*) *Lehmann v. McArthur*, L. R.

fulfil this duty, he will have broken the contract; and in such case he will be liable to compensate the purchaser in damages for the loss of his bargain (*l*), contrary to the general rule (*m*). Whenever leaseholds subject to a covenant against assignment without the lessor's consent are offered for sale, it should be stated that the property is subject to such covenant (*n*), and it should be expressly stipulated that, if the lessor's consent cannot be obtained, the contract shall be rescinded, the vendor returning the deposit, if any, but not paying the purchaser's expenses of investigating the title or otherwise (*o*). If the person to give the licence to assign should not be the original lessor, the vendor would have to prove that such person was the proper person to give the licence; and as this would involve investigation of the landlord's title, it is better for the vendor to relieve himself by express stipulation of the obligation of giving such proof (*p*). Leaseholds subject to a covenant not to assign without the lessor's licence may be sold and conveyed, without committing any breach of the covenant, either by way of underlease (provided that the covenant do not also prohibit underletting) (*q*), or by any disposition operating as an assignment in equity only and not at law, such as a declaration of trust for the purchaser (*r*). But if the vendor propose

3 Ch. 496. In *Day v. Singleton*, 1899, 2 Ch. 320, 327, 328, there are *dicta* to the apparent effect that the vendor would in such case be liable at law for breach of the contract; but it is submitted that they must be read as referring to an open contract to sell such leaseholds. In that case the sale was expressly made *subject to the landlord's consent to the transference of the lease*. This, it is submitted, would clearly absolve the vendor from breach of the contract at law, if he tried his best but failed to obtain the necessary consent.

(*l*) *Day v. Singleton*, *ubi sup*.

(*m*) Above, p. 37.

(*n*) See above, p. 351.

(*o*) See 1 Davidson, *Prec. Conv.* 562, 5th ed.; Davidson's *Concise Prec.* 120, 18th ed.

(*p*) See 1 Key & Elph. *Prec. Conv.* 292, 8th ed.

(*q*) *Crusoe d. Blencowe v. Bugby*, 2 W. Bl. 766; *Church v. Brown*, 15 Ves. 258, 265.

(*r*) *Gentle v. Faulkner*, 1900, 2 Q. B. 267. See also *Horsely Estate, Limited v. Steiger*, 1899, 2 Q. B. 79; *Grove v. Portal*, 1902, 1 Ch. 727.

to carry out the sale in either of these ways, he must make an express stipulation to that effect, or the purchaser will not be bound to accept the same as a due performance of the contract. If leaseholds be held subject to a covenant by the lessee not to assign without the lessor's licence, which is not to be unreasonably withheld, and the lessee sell them under an open contract, and the landlord refuse to consent to the proposed assignment on grounds which are apparently unreasonable, it appears that the vendor cannot oblige the purchaser to perform the contract specifically by accepting an assignment without the lessor's consent (*s*); for the lessor may have some good reason for refusing it (*t*), and would be at liberty to prove this in an action brought by himself to enforce his right of re-entry for breach of the covenant. The title would therefore be too doubtful for a Court of Equity to force upon an unwilling purchaser (*u*).

Where landlord's consent not to be unreasonably withheld.

If a lessee for years, holding at a rent and subject to lessee's covenants, assign over part of the demised land, the assignee is liable to be distrained upon for the whole of the rent reserved (*x*); although if the lessor sue him personally for the rent, either in debt or on the covenant to pay the rent, he will only be liable to pay an apportioned part of the rent proportionate to the value of the land he holds, as his personal liability to pay the rent arises only from the privity of estate between him and the lessor (*y*). It has been held that, if an assignee

Sale of part of land held by lease for years.

(*s*) See above, p. 359, n. (*f*). But of course the vendor would have a good title to assign after he had obtained, in an action against his landlord, a declaration of his right to assign without the landlord's consent.

(*t*) See and consider *Re Spark's Lease*, 1905, 1 Ch. 456; *Jenkins v. Price*, 1907, 2 Ch. 229, reversed, 1908, 1 Ch. 10; *Willmott*

v. London Road Car Co., 1910, 1 Ch. 754.

(*u*) *Re Marshall and Salt's Contract*, 1900, 2 Ch. 202.

(*x*) *Curtis v. Spitty*, 1 Bing. N. C. 756, 760; *Hyde v. Warden*, 3 Ex. D. 72, 76; see *Wms. Real Prop.* 67, 336, 21st ed.

(*y*) *Hare v. Cator*, Cowp. 766; *Stevenson v. Lambard*, 2 East. 575; *Salts v. Battersby*, 1910, 2 K. B. 155.

of part of land let on lease pay the whole rent reserved by the lease under threat of distress, he cannot assert a right of *contribution* to such payment against an under-lessee of the other part of the land, for the right to *contribution* only arises either at law or in equity where both parties are subject to a common liability (z). It is submitted, however, that in such case the party so coerced to pay the whole rent is not without remedy. He has paid off a charge upon the whole of the lands comprised in the lease (a), and on general principles of equity he should be entitled to the benefit of the charge, and to stand in the lessor's place as against that part of the demised premises which he does not hold himself (b). If a lessee for years holding subject to a proviso for re-entry on breach of covenant assign over part of the demised land, the lease remains determinable as to the whole of the demised premises on any breach of covenant; so that the lessor could re-enter upon the assignee for breach of covenant committed after the assignment by the original lessee with respect to the other part of the land (c). If, therefore, a tenant for years holding at a rent and subject to lessee's covenants and a proviso for re-entry on breach of covenant sell part of the land leased to him, and represent that the property sold is held at a rent less than that which he has to pay for the whole of the land, the purchaser could object to the title on the ground that the land sold is charged with the whole of the rent, and is subject to forfeiture for breach of covenant committed in respect of the rest of the land leased (d). It follows that on a sale of part only of land held on lease for years, special stipulation

(z) *Johnson v. Wild*, 44 Ch. D. 146.

(a) See above, p. 361, n. (x).

(b) This view of the question seems to have escaped the notice of the learned counsel for the plaintiff and of the Court in *Johnson v. Wild*, ubi sup.

(c) *Hyde v. Warden*, 3 Ex. D. 72, 76; *Dewar v. Goodman*, 1909, A. C. 72; above, p. 357, and n. (a).

(d) *Hyde v. Warden*, 3 Ex. D. 72, 76, 81; see also *Fildes v. Hooker*, 3 Madd. 193.

must be made precluding objection to the title on these grounds, and providing for apportionment of the rent as between the vendor and the purchaser (*e*). As already mentioned, when leasehold property is sold in lots, it is usually stipulated that one of the purchasers shall take an assignment of the lease, and the others shall accept underleases either from that purchaser or from the vendor (*f*).

Sale of leaseholds in lots.

Where leaseholds for years perpetually renewable under a covenant in that behalf (*g*) are sold as such, it appears that, in the absence of stipulation to the contrary, the purchaser is entitled to be satisfied that he will obtain, not only the existing term, but also the effective right to renew it for ever. He is in fact buying, not merely the term, but an equitable interest in the fee simple as well (*h*). It is thought therefore that, where the first lease was granted less than forty years before the contract, the purchaser is not precluded by the Vendor and Purchaser Act, 1874 (*i*), from calling for the title to confer the right of renewal, and may require the production, not only of the first lease containing the covenant of renewal and the subsequent title thereunder, but also of the title to the

Sale of renewable leaseholds.

(*e*) See above, p. 81.

(*f*) Above, p. 82; 1 Dart, V. & P. 132, 5th ed.; 148, 6th ed.; see 1 Davidson, Prec. Conv. 545, 632, n., 699—701, 4th ed.; *ibid.* 453, 529, n., 563—566, 5th ed.; 1 Key & Elph. Prec. Conv. 293, and n. (*d*), 8th ed.; Davidson's Concise Precedents, 116, and n. (*b*), 17th ed.

(*g*) Covenants to renew leases for years or lives continually on their expiration for ever are held to be valid and either not to be obnoxious to or to be excepted out of the rule against perpetuities, and may be specifically enforced; see *Ross v. Worsop*, 1 Bro. P. C. 281;

Pendred v. Griffith, *ib.* 314; *Sweet v. Anderson*, 2 Bro. P. C. 256; *Iggulden v. May*, 9 Ves. 325, 334; *S. C.*, 7 East, 237, 242—245; *Hare v. Burges*, 4 K. & J. 45, 57; *Pollock v. Booth*, *Ir. R.* 9 Eq. 229; Jessel, M. R., *London & South Western Ry. Co. v. Gomm*, 20 Ch. D. 562, 579; *Swinburne v. Milburn*, 9 App. Cas. 844, 850, 853, 855; 42 Sol. J. 629, 630 (by the author); Gray, *Rule against Perpetuities*, §§ 230, 230a, 2nd ed.

(*h*) See Jessel, M. R., *Moore v. Clench*, 1 Ch. D. 447, 452.

(*i*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1; above, p. 99.

freehold from the granting of the first lease back to the beginning of forty years before the contract (*j*). Where the first lease was granted more than forty years before the contract, it is thought that not more than forty years' title under the leases and the covenant to renew them could be required to be shown, and that such enjoyment would have to be accepted as *primâ facie* evidence that the right of renewal was effectually conferred (*j*). But it is conceived that the purchaser would be entitled to require proof of some covenant for perpetual renewal entered into forty years at least before the sale; and that if the right of perpetual renewal should depend solely on the original covenant to renew, and not on new covenants to that effect contained in the renewed leases, he would have the right to call for an abstract and production of the instrument containing the original covenant (*k*). In cases of this kind, the renewed lease is usually granted partly in consideration of the surrender of the then existing lease, and where this has occurred within the time, for which title can be required to be shown, the purchaser has the right to require proof that the surrenderor was entitled to the entire interest, legal as well as equitable, in the lease surrendered. For if there were anything in that lease to give notice that the surrenderor was a trustee of his interest therein, and consequently of his interest in the renewed lease, the purchaser would take with notice of such trust (*l*). It appears from this that any lease granted in express consideration of the surrender of a prior lease is not in itself a good root of title (*m*). The vendor of leaseholds, which are renewable, whether

(*j*) See above, pp. 94—97, 100; 1 Davidson, *Prec. Conv.* 534, 4th ed.; 443, 5th ed.; Sug. V. & P. 369, 370.

(*k*) See above, pp. 94—98, 100.

(*l*) See *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hodgkinson v.*

Cooper, 9 Beav. 304; Sug. V. & P. 369; 1 Dart, V. & P. 291, 5th ed.; 332, 6th ed.; 327, 7th ed.; 1 Davidson, *Prec. Conv.* 696, n. (*l*), 4th ed.; above, pp. 237 *sq.*

(*m*) See above, pp. 106—108.

perpetually or for some definite period, should protect himself by special stipulation against these liabilities (*n*). And it seems that in any case where a lease is sold, which has on the face of it been granted in consideration of the surrender of a former lease, the vendor should make special provision to preclude his being required to prove that the surrenderor was entitled to the whole interest in the lease surrendered (*o*).

Sale of lease granted on surrender of a prior lease.

The reader will remember that under the present law, when the purposes of long terms of years created for securing the payment of money charged on land have been satisfied, they either cease, where originally limited subject to a proviso for cesser, by virtue of such proviso, or they are made to merge by being assigned or surrendered to the person or persons seised of the freehold in the land subject to the term, or they become attendant upon the inheritance by express declaration or construction of law and thereupon cease and determine under the Satisfied Terms Act of 1845 (*p*). Whenever any land sold has been subject to such a term, it is of course material for the purchaser's counsel to ascertain that it became utterly extinct; and if the date of the term's alleged cesser fall within the period for which title has to be shown, the title to the term down to that date must be abstracted and produced (*q*). It should be borne in mind that cesser under an express proviso does not usually take place unless and until the

Satisfied terms.

Proviso for cesser.

(*n*) See 1 Davidson, *Prec. Conv.* 696, n. (*l*), 4th ed.; 1 Key & Elph. *Prec. Conv.* 284, 4th ed.; 290, 8th ed.; *Encyclopedia of Forms and Precedents*, xii. 344.

(*o*) See authorities cited in last note but two. It appears, however, that if it be expressly stated in the contract or conditions of sale that the lease sold was granted in consideration of the surrender of a prior lease, it would be sufficient to stipulate

that the title shall commence with the new lease; see stat. 44 & 45 Vict. c. 41, s. 3 (3); above, pp. 108, n. (*o*), 193 *sq.*, 209.

(*p*) Stat. 8 & 9 Vict. c. 112, s. 2; *Wms. Real Prop.* 413-421, 13th ed.; 534-545, 21st ed.

(*q*) See *Lyle v. Farborough*, *John.* 70, 74, 77, 78; *Sug. V. & P.* 616 *sq.*; 1 *Dart. V. & P.* 289, 5th ed.; 329, 6th ed.; 326, 7th ed.

Merger.

Trustees of a term should surrender it themselves.

Cesser under Satisfied Terms Act.

trustees of the term have been duly reimbursed all their costs and expenses (*r*); and that, in order to effect the merger of a term, it must be surrendered to the person entitled at law in reversion immediately expectant on the term to the freehold or some leasehold (*s*) estate in the land demised (*t*). No merger will take place if the surrenderee were entitled in equity only and not at law, or if another term of years be outstanding between the estates of the surrenderor and the surrenderee (*u*). Whenever a term vested in trustees is intended to be merged, they should themselves surrender it; as the persons equitably interested in the term cannot make any effective assurance of the legal estate therein, and the trustees may have a lien on the term for their costs, which would prevent it from becoming extinct as a satisfied term (*x*). With respect to the cesser under the Satisfied Terms Act of 1845 of terms becoming satisfied after that year (*y*), it is to be noted that such terms only are extinguished as have become satisfied and attendant on the inheritance. A term does not become so satisfied and attendant unless the beneficial interest in the whole charge secured by the term and the beneficial interest in the entire freehold estate affected by the term are united in one person, or so long as there remains any useful purpose beneficial to the owner of the term and consistent with

(*r*) See 3 Davidson, Prec. Conv. 1165, 1251, n., 1261, 3rd ed.

(*s*) *Hughes v. Robotham*, Cro. Eliz. 302; Sug. V. & P. 619.

(*t*) Co. Litt. 337 b; Shep. Touch. 303 sq.; 2 Black. Comm. 326; Burton, Comp. 287, 2nd ed.; Sug. V. & P. 617 sq.

(*u*) See *Whitchurch v. Whitchurch*, 2 P. W. 326; 9 Mod. 124; *Scott v. Fenhoulllet*, 1 Bro. C. C. 69; *Rooper v. Harrison*, 2 K. & J. 86, 110—115; Burt. Comp. 287, 2nd ed.; Sug. V. & P. 625.

(*x*) See Davidson, Prec. Conv. vol. ii. part i. p. 310, n., 4th ed.; cf. Davidson, Prec. Conv. vol. v. part ii. p. 178, 3rd ed., where the point as to costs is not mentioned.

(*y*) Stat. 8 & 9 Vict. c. 112, s. 2. As to the cesser under that Act of satisfied terms, which were on the 31st Dec. 1845, attendant on the inheritance, and the protection afforded by such terms, see *Doe v. Price*, 16 M. & W. 603; *Doe v. Mousdale*, ib. 689; *Cottrell v. Hughes*, 15 C. B. 532; *Plant v. Taylor*, 7 H. & N. 211.

the trusts thereof (z). And a term is not *satisfied*, so as to cease under the Act, so long as any of the moneys originally secured thereby, including the trustees' costs (a), remain unpaid, or if any incumbrance, against which the term would be an effectual protection, be outstanding (b).

The rules as to terms becoming satisfied are not applicable to terms granted for the purpose of reserving rent and subject to the performance of lessee's covenants, but questions often arise upon titles whether such terms have been extinguished by reason of the ownership of the term and of the fee simple becoming united in one person; as where the termor has purchased the fee simple or the freeholder the term. Under the common law such a term merged at law if by any means it became vested in the tenant of the freehold in his own right and not *en autre droit* (c). But if in such case merger would be prejudicial to any equitable interest in the term, or the owner had expressed the intention of keeping the term alive, the term would be treated in equity as still subsisting (d). On the other hand a term not merged at law would be treated in equity as attendant on the inheritance if the equitable ownership of the term and the fee simple became united and an intention of extinguishing the term were

Whether terms subject to rent and lessee's covenants become extinct when acquired by the freeholder.

Old law of merger.

Rules of equity as to merger.

(z) *Anderson v. Pignet*, L. R. 8 Ch. 180, 188—190.

(a) Above, p. 366.

(b) See *Doc d. Clay v. Jones*, 13 Q. B. 774; *Freer v. Hesse*, 17 Jur. 177, reversed on other grounds, ib. 703, 4 De G. M. & G. 495; *Shaw v. Johnson*, 1 Dr. & Sm. 412, 7 Jur. N. S. 1005 (where the dates are given); *Anderson v. Pignet*, L. R. 8 Ch. 180, 189; Sug. R. P. Stat. 278—281, 2nd ed.; Sug. V. & P. 626; 1 Dart, V. & P. 507, 508, 5th ed.; 577, 578, 6th ed.

(c) Co. Litt. 338 b; 2 Black. Comm. 177; Sug. V. & P. 617 *sq.*; 1 Wms. Exors. 641, 642, 7th ed.; Wms. Real Prop. 251, 283, 414—416, 13th ed.; 341, 371, 535—538, 21st ed.

(d) See *Thorn v. Newman*, 3 Swanst. 603; *Nurse v. Yerrworth*, ib. 608, 618; *Philips v. Philips*, 1 P. W. 34, 41; Sug. V. & P. 620, 621; *Chambers v. Kingham*, 10 Ch. D. 743; also *Adams v. Angell*, 5 Ch. D. 634, 645, 646; and cases cited below, p. 368, n. (j).

Purchase of
fee by termor
or of term by
freeholder.

expressed or implied (*e*). Thus if the termor contracted to buy the fee simple, or *vice versa*, it was considered that the term would be extinguished in equity, unless a contrary intention were shown (*f*). But where the intention of keeping the term on foot was expressed, as where the termor took a conveyance of the fee in the name of a trustee for himself and his heirs with a declaration against merger (*g*), or the freeholder in fee took a conveyance of the term to a trustee on trust for himself, his executors, administrators and assigns (*h*), the purchaser's interest in the term remained distinct, in equity as well as at law, from his ownership of the fee simple. Since the commencement of the Judicature Acts (*i*) merger does not take place by operation of law only of any estate, in which the beneficial interest would not be deemed to be merged or extinguished in equity. And since that time, when the owner of the term purchases or takes a conveyance of the fee simple, or *vice versa*, the term does not merge, if an intention of keeping it on foot be shown, notwithstanding that the term and the inheritance be vested at law in the same person (*j*).

Present law as
to merger.

Land held for
long term
enlarged
into fee
simple.

Where land sold is held for a long term of years enlarged into a fee simple under the Conveyancing Acts of 1881 and 1882 (*k*), and the enlargement has taken place within the period for which the title is to be investigated, the vendor must remember that the deed

(*e*) *Whitchurch v. Whitchurch*, 2 P. W. 236; 9 Mod. 124; *Goodright v. Sales*, 2 Wils. 329, 331.

(*f*) *Capel v. Girdler*, 9 Ves. 509; Sug. V. & P. 625, 626; and see *Saxton v. Saxton*, 13 Ch. D. 359, and cases there cited.

(*g*) *Belaney v. Belaney*, L. R. 2 Ch. 138.

(*h*) *Gunter v. Gunter*, 23 Beav. 571.

(*i*) Stat. 36 & 37 Vict. c. 66, s. 25 (4), which commenced on

the 1st Nov. 1875; stat. 37 & 38 Vict. c. 83.

(*j*) See *Ingle v. Vaughan Jenkins*, 1900, 2 Ch. 368; *Thellusson v. Liddard*, ib. 635; *Capital & Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631; *Lea v. Thursby*, 1904, 2 Ch. 57; *Re Gibbon*, 1909, 1 Ch. 367, 373.

(*k*) Stats. 44 & 45 Vict. c. 41, s. 65, amended by 45 & 46 Vict. c. 39, s. 11.

of enlargement is not in itself a good root of title (*l*), and that, in the absence of stipulation to the contrary, he will be bound to show title to the term down to the date of the enlargement, that is, to abstract and produce the instrument which created the term, and so much of the subsequent title prior to the enlargement as will carry the abstract back to a date at least forty years before the sale (*m*). And he must not forget that it lies on him to prove that the enlargement purported to be made was warranted by the powers given by the Acts (*n*). The purchaser's advisers should see that the vendor's duties in these respects are duly discharged; except of course so far as he is by special stipulation in the contract exonerated from performing them.

On the purchase of leaseholds settled on such trusts as shall correspond, as nearly as the rules of law and equity will permit, with the uses declared of some freehold lands assured in strict settlement (*o*), it must not be forgotten that the leaseholds are not thereby converted in equity into real estate (*p*). On the contrary, they remain personal estate and will therefore vest absolutely (subject to any prior life interests) in the person, who becomes entitled to the first estate of inheritance, whether in fee or in tail, in the settled freeholds (*q*); unless the settlement contain the usual proviso that the leaseholds shall not vest absolutely in any person thereby made tenant in tail by purchase unless he shall attain the age of twenty-one years, but

Leaseholds settled on trust to go with freeholds.

(*l*) See above, pp. 106--108, 208--210.

(*m*) See above, pp. 97-101, 192, 208--210.

(*n*) See Hood & Challis, *Conv. and Settled Land Acts*, 160 *sq.*, 9th ed.

(*o*) As to this mode of settlement, see Davidson, *Proc. Conv.* vol. 3, pp. 599--605, 1130, 3rd

ed.; vol. 4, p. 435, 3rd ed.; Williams on Settlements, 223.

(*p*) See *Re Walker*, 1908, 2 Ch. 705, 712; *Re Gibbon*, 1909, 1 Ch. 367, 378.

(*q*) See *Foley v. Burnell*, 1 Bro. C. C. 274, 4 Bro. P. C. 319; Wms. Pers. Prop. 363, 409, 410, 16th ed.; and authorities cited in note (*o*), above.

shall devolve on his death as if they were freeholds of inheritance limited to the uses of the settlement. Such a proviso is only effective if confined to tenants in tail taking by purchase; and does not of course prevent the leaseholds from vesting absolutely in the person, who becomes entitled to the first estate tail, if he take by purchase and be of or attain full age, or if he should become entitled thereto by inheritance (whether of full age or not) (*r*). Leaseholds settled in this way do not, of course, require to be disentailed at any time. If a re-settlement be made, they should be assigned, as the absolute property in reversion of the tenant in tail, upon trusts to correspond with the uses declared of the freeholds thereby assured, subject to the above-mentioned proviso (*s*).

Options to purchase contained in leases.

Sometimes leases contain an agreement giving to the lessee, his executors, administrators or assigns, the option of purchasing the freehold from the lessor, his heirs or assigns, either at any time during the continuance of the term or within some shorter period. It must be remembered that covenants of this kind are collateral covenants, not touching or concerning the demised premises as such, and are subject to the same law as options to purchase conferred by agreements independent of leases (*t*). Contracts giving options exercisable at any future time (without limit) to purchase land are so far subject to the rule against perpetuities that the Courts will not enforce them specifically against persons not parties to the contract, who have acquired the original

How far options of purchase are subject to the rule against perpetuities.

(*r*) See authorities cited in note (*e*), above. Personal chattels such as furniture, pictures, plate and jewels, are governed by the same law when settled on trust to accompany freeholds; see *Wms. Pers. Prop.* 408—410, 16th ed.; but see *Re Chesham's Settlement*, 1909, 2 Ch. 329, and Mr. Charles

Sweet's criticism of this decision in 54 Sol. J. 26; *Re Parker*, 1910, 1 Ch. 581.

(*s*) See 2 Key & Elph. Prec. Conv. 710, 715, 4th ed.; 744, 748, 9th ed.

(*t*) *Woodall v. Clifton*, 1905, 2 Ch. 257; and see an article by the writer in 42 Sol. J. 628, 650.

contractor's estate by succession after death or by assignment with notice of the contract, in any case where the effect of ordering such specific performance would be to secure to the person entitled to the option a contingent equitable interest in the land, which would not necessarily vest (if at all) within the period allowed by the rule (*u*). It has been held, however, that such agreements are not void at law as contracts, but are enforceable by action for damages in case of their breach (*x*). And it has been considered that contracts of this kind are specifically enforceable against the original contractor, even though made by a corporation enjoying immortal existence (*y*). The result is that, to be perfectly effective, options to purchase land must be limited so as to be exercisable only within some period not exceeding that allowed by the rule against perpetuities, namely, the duration of some specified life or lives in being at the date of the contract giving the option and twenty-one years thereafter (*z*), and this is equally the case where the contract is contained in a lease as where it is not. If therefore the lease be for a term exceeding twenty-one years and the option be for the lessee, his executors, administrators or assigns, to purchase of the lessor, his heirs or assigns, at any time during the term, the option is only partially effective.

(*u*) *London & South Western Ry. Co. v. Gomm*, 20 Ch. D. 562, 580, *sq.*; and see *South Eastern Ry. Co. v. Associated Portland &c., Ltd.*, 1910, 1 Ch. 12, 28—34, the decision in which case is criticised by the writer in 54 Sol. J. 471, 501.

(*x*) *Working Corp. v. Heather*, 1906, 2 Ch. 532. An appeal was entered against this decision, but the case was compromised. The decision in this case is criticised by the writer in 51 Sol. J. 648, 669, where it is respectfully submitted that agreements of this

kind are in general or unlimited restraint of alienation, and ought to be treated as void on that account; see also another article by the writer on this subject in 54 Sol. J. 471, 501.

(*y*) *South Eastern Ry. Co. v. Associated Portland &c., Ltd.*, 1910, 1 Ch. 12, 28—34. This decision is criticised by the writer in 54 Sol. J. 471, 501.

(*z*) See Wms. Real Prop. 405—407, 21st ed.; and the writer's article on the Rule against Perpetuities in the *Encyclopædia of the Laws of England*, 2nd ed.

It would be specifically enforceable against the lessor himself, or (as it appears) by the lessee himself against the lessor's heirs or assigns: but not by the lessee's assigns against the lessor's assigns (*a*).

Reversionary
leases.

Where the landlord of a tenant for a term of years has granted to him a new lease to commence in reversion upon the expiration of the existing term, it must not be forgotten that during this term the tenant has only an *interesse termini*, and no *term*, under the new lease; he is not tenant for one term compiled by adding the years to be enjoyed under the new lease to the existing term. If, therefore, the tenant should have underlet for a period exceeding the existing term, he will in effect have assigned his interest in the term, and will have no reversion enabling him to distrain for the rent reserved by the underlease (*b*). Terms of years may of course be limited to commence at a future time (*c*); and no period was defined by the ancient common law within which such terms should be required to take effect (*d*). But of late years the question has been raised whether terms to commence *in futuro* are well limited if they may take effect at some time exceeding the period allowed by the rule against perpetuities (*e*). And having regard to the recent trend of judicial opinion on this subject (*f*), it cannot safely be assumed

Terms to
commence
in futuro.

(*a*) See *Woodall v. Clifton*, 1905, 2 Ch. 257; *Worthing Corpn. v. Heather*, 1906, 2 Ch. 532; and the writer's articles in 42 Sol. J. 630, 650; 51 Sol. J. 648, 669, 670.

(*b*) *Lewis v. Baker*, 1905, 1 Ch. 46; *Llangattock v. Watney, &c., Ltd.*, 1910, 1 K. B. 236; affirmed, 1910, A. C. 394; see Wms. Real Prop. 507, 523, 21st ed.

(*c*) Wms. Real Prop. 395, 13th ed.; 505, 21st ed.

(*d*) See *Smith v. Day*, 2 M. & W. 684; 3rd Rep. of Real Property Commrs., 29, 31; Encyclo-

pædia of the Laws of England, xi. 72, 73, 2nd ed. (by the author).

(*e*) See 1 Sand. Uses, 197, 199, 4th ed.; Lewis on Perpetuities, 600, 609, 614; Gray on Perpetuities, §§ 299—303, 314, 316, 319, 2nd ed.

(*f*) See North, J., *Dunn v. Flood*, 25 Ch. D. 629; Baggallay, L. J., *S.C.*, 28 Ch. D. 592; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540 (these opinions are criticised below, Chap. XII. § 3); Farwell, L. J., *South Eastern Ry. Co. v. Associated Portland &c.*,

that terms limited to commence at a future time beyond that period are validly created.

§ 3.—*Sale of Lands in a Register County or Compulsory Registration District.*

If the property purchased be situate in Middlesex or Yorkshire (including the town and county of Kingston-upon-Hull), the conveyancer must, of course, have regard, in advising on title, to the law established by the Registry Acts (*g*) for those counties, and to the construction placed on the Middlesex and the old Yorkshire Registry Acts in Courts of Equity with regard to purchasers having notice of prior unregistered assurances (*h*). He should note, in perusing the abstract, whether every document which ought to be registered has been duly registered, and, if not, he should require the vendor to procure the same, if still capable of registration, to be registered at the vendor's expense (*i*).

Lands in
Middlesex or
Yorkshire.

Ltd., 1910, 1 Ch. 12, 27 (as to which case and *dictum*, see above, p. 371, n. (*y*); Wms. Real Prop. 415. and note (*c*), 21st ed.; and the writer's article on the Rule against Perpetuities in the Encyclopædia of the Laws of England, vol. ii. pp. 72, 73, 2nd ed.

(*g*) Stats. 7 Anne, c. 20, for Middlesex, of which the register was transferred to the Land Registry Office by 54 & 55 Vict. c. 64; 2 & 3 Anne, c. 4; 6 Anne, c. 20 (5 Anne, c. 18, in Ruffhead), for the West Riding of Yorkshire; 6 Anne, c. 62 (c. 35 in Ruffhead), for the East Riding and Kingston-upon-Hull; and 8 Geo. II. c. 6, for the North Riding. All the Yorkshire Acts were repealed and replaced by 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26.

(*h*) See Wms. Real Prop. 211, 262, 572—574, 21st ed.; 2 Dart. V. & P. 678—685, 852—857, 5th

ed.; 767—776, 958—965, 6th ed.; 697—705, 865—872, 7th ed.; Brickdale on Registration in Middlesex.

(*i*) Sug. V. & P. 546. The memorial to be registered in Middlesex or Yorkshire of any deed was required to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, and to be attested by two witnesses, whereof one should be one of the witnesses to the execution of the deed: Sug. V. & P. 729, 730. The Yorkshire Registries Act, 1884, s. 6, substituted *parties to the deed for grantors or grantees and one or more for two witnesses*. In Middlesex, the memorial is now required to be attested by one witness only, such witness, *where practicable*, to be a witness to the execution of the deed: stat. 54 & 55 Vict. c. 64, s. 2, and First Schedule,

If the omission to register cannot be rectified, the purchaser's counsel must consider whether the circumstances are such as prevent his client from obtaining an indefeasible legal estate in the property purchased, and he should make requisitions or objections as to the title, according to the conclusion at which he arrives. With regard to dispositions taking effect *inter vivos*, the general effect of the Middlesex and old Yorkshire Registry Acts was that an unregistered deed or conveyance of lands in either of these counties was voidable at law by a subsequent registered deed or conveyance of the same lands to a purchaser or mortgagee for valuable consideration (*k*). But an unregistered assurance by deed was not void or inoperative; it passed the legal estate to the grantee, and was only defeasible by such a registered assurance as above described (*l*). Thus, if A. granted the same lands by unregistered deed first to B. and subsequently to C., whether

r. 2; Land Registry (Middlesex Deeds) Rules, 1892, r. 6; W. N. 13th Feb. 1892. It is sufficient if a witness to the execution of the deed by the grantee attest the memorial: *R. v. Registrar for Middlesex*, 21 Q. B. D. 555. In default of compliance with these conditions the registration is void: *Essex v. Baugh*, 1 Y. & C. C. C. 620.

(*k*) Stats. 2 & 3 Anne, c. 4, s. 1; 6 Anne, c. 62 (c. 35 in Ruffhead), s. 1; 7 Anne, c. 20, s. 1; 8 Geo. II. c. 6, s. 1. These enactments required the registration of "all deeds and conveyances whereby any hereditaments may be in any way affected at law or in equity"; and it was held that these words extend to a written memorandum of an agreement giving or operating as a charge in equity upon certain lands: *Neve v. Pennell*, 2 H. & M. 170, 185—187; *Credland v. Potter*, L. R. 10 Ch. 8; but not to the charge created by a deposit of title deeds without

agreement or memorandum in writing: *Sumpter v. Cooper*, 2 B. & Ad. 223; or to a vendor's lien arising without express agreement in writing: *Kettlewell v. Watson*, 26 Ch. D. 501, 507; or to the vesting, effected by an adjudication of bankruptcy, of the bankrupt's estate in his trustee: *Re Culcott and Elvin's Contract*, 1898, 2 Ch. 460. Considering these decisions, it would appear that the words above quoted are wide enough to include an unsealed memorandum in writing of a contract to sell land, *Brady, Ir. C., Gardiner v. Blesington*, 1 Ir. Ch. Rep. 79, 85; but see and consider *Inland Revenue Commrs. v. Angus*, 23 Q. B. D. 579; *Rodger v. Harrison*, 1893, 1 Q. B. 161. The law stated in this note now applies to lands in Middlesex only; see below, p. 377, and n. (*z*).

(*l*) Grant, M. R., *Jones v. Gibbons*, 9 Ves. 407, 411.

for value or not, and C. by registered deed granted the lands to D. on a sale or mortgage, D. did not thus obtain the legal estate or any priority of interest over B. For when A. granted the lands to C., he had already parted with all his estate therein to B., and A.'s grant to C., being unregistered, could not operate to displace B.'s estate (*m*). If, however, the conveyance from A. to C. were duly registered, as well as that from C. to D., D. would obtain the legal estate, whether he had or had not notice of the conveyance from A. to B. (*n*); but if he had such notice, *in equity* he would obtain no priority of interest over B., and would be a trustee of his legal estate for B.'s benefit (*o*). It has been decided by the House of Lords, in a case upon the Irish Registry Act, that in order to avoid an unregistered assurance it is not necessary that the subsequent registered conveyance should be made by the first grantor personally; it may be made by anyone who, but for the unregistered assurance, would take his estate by operation of law in his lifetime (*p*). And

(*m*) *Jack d. Rennick v. Armstrong*, 1 Hud. & B. 727; *Fury v. Smith*, ib. 735: both cases on the Irish Registry Act; 2 Dart, V. & P. 855, 856, 5th ed.; 963, 964, 6th ed.; 871, 872, 7th ed.

(*n*) *Doe d. Robinson v. Allsop*, 5 B. & A. 142.

(*o*) *Le Neve v. Le Neve*, Amb. 436; 2 White & Tudor L. C. Eq. As a rule, actual notice of a previous unregistered assurance was necessary to deprive a purchaser of the benefit of registration: *Wyllatt v. Barwell*, 19 Ves. 435. He would not lose his priority through not making investigations or inquiries for unregistered documents: *Agra Bank, Limited v. Barry*, L. R. 7 H. L. 135; *Lee v. Clutton*, 45 L. J. Ch. 43, 46 L. J. Ch. 48. But if his solicitor or agent had actual notice, such notice would

be imputed to him: *Rolland v. Hart*, L. R. 6 Ch. 678. Registration of an assurance is not of itself equivalent to notice thereof: *Morecock v. Dickinson*, Amb. 678; *Re Russell Road Purchase Monies*, L. R. 12 Eq. 78, 83. But if one search in the register, he is affected with notice of registered assurances: *Bushell v. Bushell*, 1 Sch. & Lef. 90, 103; *Hodgson v. Dean*, 2 Sim. & Stu. 221, 225; *Procter v. Cooper*, 1 Jur. N. S. 149.

(*p*) *Warburton v. Loveland*, 2 Dow & C. 480, where a woman entitled to a term of years settled it on her marriage by unregistered assurance, and it was held that this settlement must be postponed to a registered assignment of the term by her husband to a purchaser.

Wills.

in the same case the English judges, who were called in to advise the House, unanimously expressed the opinion (*q*) that a secret conveyance of a man's lands made by unregistered assurance may be avoided by a registered conveyance from his heir, or even from his devisee (*r*) to a purchaser. Wills of lands in Middlesex or Yorkshire, if not registered within six months of the testator's death, were voidable by a registered conveyance from the testator's heir to a purchaser (*s*); so that the devisee under a will not so registered could not make a good title to the devised lands without the heir's concurrence (*t*). But under the Vendor and Purchaser Act, 1874 (*u*), where such a will has not been registered within due time, an assurance of the land to a purchaser or mortgagee by the devisee, or by someone deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law. It is not clear to what extent this enactment is retrospective. On a sale of lands in Middlesex by the devisees under an unregistered will of a testator, who died in 1875, subject to the condition that no objection should be taken on account of any document not being registered in Middlesex, the purchaser was obliged to take the

(*q*) 2 Dow & C. 495.

(*r*) Assuming, it is presumed, that the will was duly registered: see Dart, V. & P. 683, 684, 5th ed., 772, 6th ed.; 701, 7th ed. The rule subsequently laid down by Mr. Dart and his editors (p. 855, 5th ed., 963, 6th ed.; 871, 7th ed.), that a purchaser under an unregistered conveyance can only be disturbed by a purchaser from the first grantor or parties taking under him by *act in law*, does not appear to be quite accurately expressed, as a devisee is the testator's assign.

(*s*) That is, if the testator died in Great Britain. Three years were given for registration from

the death of a testator dying upon or beyond the seas. In case of an impediment to the registration of the will, a memorial of the impediment might be registered and the will might be registered within six months after the removal of the impediment. See stats. 7 Anne, c. 20, ss. 1, 8, 9; 2 & 3 Anne, c. 4, ss. 1, 20, 21; 6 Anne, c. 35, ss. 1, 14, 15, 34; 8 Geo. 2, c. 6, ss. 1, 15, 16; *Chadwick v. Turner*, 34 Beav. 634, L. R. 1 Ch. 310.

(*t*) 2 Dart, V. & P. 682, 683, 5th ed.; 771, 772, 6th ed.; 701, 7th ed.

(*u*) Stat. 37 & 38 Vict. c. 78, s. 8.

title, notwithstanding that it was unknown who was the heir, and search against the heir's name was thus prevented (*x*).

The Yorkshire Registries Act, 1884 (*y*), provides that all assurances (as defined in the Act) (*z*) affecting lands in Yorkshire *may be* registered under the Act, and that all assurances entitled to be registered under this Act shall have priority according to the date of registration (*a*), and that all priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no

Yorkshire
Registries
Act, 1884.

x) *Girling v. Girling*, W. N. 1886, p. 18.

(*y*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, as amended by 48 & 49 Vict. c. 26, s. 4.

(*z*) By stat. 47 & 48 Vict. c. 54, s. 3, in this Act, unless the context otherwise requires, the expression *assurance* shall include any conveyance, enlargement of term into fee simple, memorandum of charge, deed of consent to the discharge of a trustee, statutory receipt, private Act of Parliament, award or order of the Land Commissioners, order of a Court, certificate of appointment of a trustee in bankruptcy, or affidavit of vesting under any Act of Parliament; and the expressions *conveyance* (which is confined to certain conveyances made by deed), *enlargement of term into fee simple*, *memorandum of charge*, *statutory receipt*, *award or order of Land Commissioners* and *order of a Court* (which includes writ of execution and adjudication in bankruptcy), are also elaborately interpreted. The powers of the Land Commissioners were in 1889 transferred to the Board of Agriculture; see

above, pp. 146, n. (*k*), 147, n. (*q*), 152. By sect. 7 of the Act, the charge given by a vendor's lien or a deposit of title deeds is required to be accompanied by a registered memorandum in order to give priority over subsequent registered assurances for valuable consideration. It has been held that a written memorandum of a contract for the sale of land in Yorkshire, subject to the conditions implied by law that the vendor shall show a good title and convey on acceptance of the title, and payment of the price, is not an assurance within the meaning of this Act: *Rodger v. Harrison*, 1893, 1 Q. B. 161.

(*a*) By stat. 48 & 49 Vict. c. 26, s. 3, a *caveat* in favour of any person may be registered with respect to any lands in Yorkshire by any person claiming to be entitled to any interest therein; and if, while the *caveat* remains in force, an assurance of the lands from the giver of the *caveat* to the other, his representatives or assigns, be duly registered, such assurance shall have priority as though it had been registered on the date of registration of the *caveat*.

such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud (*b*). This Act appears to have the same effect as the Acts which it repealed (*c*), with respect to the operation of conveyances *inter vivos* at law (*d*); but to abolish the doctrine as to notice applied in equity to the old Acts (*e*). Under the Act of 1884 (*f*), wills of lands in Yorkshire shall have priority according to the date of the testator's death, if registered or entitled to rank as registered, within six months thereafter (*g*); and if registered later, according to the date of registration. But the Act provides (*h*) for the registration within six months after a landholder's death of an affidavit of his intestacy, and gives priority, where such an affidavit has been registered, to any duly registered assurance for valuable consideration by any person entitled to execute the same in case of such intestacy, over any will of the supposed intestate which shall be subsequently registered, and shall not be entitled to rank as registered within six months after the testator's death.

Exceptions.

The Middlesex Registry Act and the old Yorkshire Registry Acts do not extend to copyhold estates, leases at a rack rent, or leases not exceeding twenty-one years when the actual possession and occupation go along with the lease (*i*). And the Middlesex Registry Act does not extend

(*b*) See *Battison v. Hobson*, 1896, 2 Ch. 403.

(*c*) Above, p. 373, n. (*g*).

(*d*) Above, p. 374.

(*e*) Above, p. 375. This doctrine remains in force with regard to lands in Middlesex.

(*f*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, amended by 48 & 49 Vict. c. 26, s. 4.

(*g*) If the will cannot be registered within six months after the testator's death, notice of the will

may be registered within the same period, and in such case the will, if registered within two years after the testator's death, will have priority as though it were registered on the date of registration of the notice: stat. 47 & 48 Vict. c. 54, s. 11.

(*h*) Sect. 12.

(*i*) Stats. 7 Anne, c. 20, s. 17; 2 & 3 Anne, c. 4, s. 16; 6 Anne, c. 35, s. 29; 8 Geo. II. c. 6, s. 34.

to Chambers in Serjeant's Inn, the Inns of Court or Inns of Chancery (*k*), and has no application to the City of London (*l*). The Yorkshire Registry Act, 1884 (*m*), does not extend to copyholds, or to any lease not exceeding twenty-one years, or any assignment thereof, where accompanied by actual possession from the making of such lease or assignment; and the Act does not apply to land in the city of York (*n*). It has been held that, under the old Yorkshire Registry Acts, it was not necessary to register an assignment by deed of a pecuniary legacy charged on land in Yorkshire (*o*); and that, under the Middlesex Registry Act, registration need not be made of a conveyance of an interest in the proceeds of sale of land devised in trust for sale (*p*). Here we may note that the non-registration of wills of leaseholds does not appear to be an objection to the title thereto (*q*), as, when a will of leaseholds has been proved, there is no one, like the heir of freeholds, who could possibly convey them to a purchaser so as to defeat the executors' or legatees' title (*r*). And pending probate, the leaseholds could only be lawfully disposed of by an administrator duly appointed on the supposition of intestacy; in which case the validity of the administrator's dealings therewith would appear to depend on the general law (*s*) and not on the policy of

Wills of
leaseholds.

(*k*) Stat. 7 Anne, c. 20, s. 17.

(*l*) Sug. V. & P. 732. Lands taken in 1888 from Middlesex to make up the county of London remained subject to the jurisdiction of the Middlesex Registry: stat. 51 & 52 Vict. c. 41, ss. 40, 96.

(*m*) Stat. 47 & 48 Vict. c. 51, s. 28.

(*n*) This was equally the case with the old Yorkshire Registry Acts.

(*o*) *Malcolm v. Charlesworth*, 1 Keen, 63, doubted in Davidson, Prec. Conv. vol. 2, part 2, p. 219, 4th ed., but approved by Kay, J.,

in *Arden v. Arden*, 29 Ch. D. 702.

(*p*) *Arden v. Arden*, ubi sup.

(*q*) See 2 Dart, V. & P. 683, 5th ed.; 772, 6th ed.; 702, 7th ed.

(*r*) Besides this reason, the provisions of the Middlesex and old Yorkshire Registry Acts for registrations of wills of lands appear inapplicable to leaseholds, the memorial being required to be the act of the devisee: see stat. 54 & 55 Vict. c. 64, First Sched. r. 3. The Yorkshire Registries Act, 1884, s. 6, permits registration of a will by the executor.

(*s*) See 1 Wms. Exors. Pt. I. Bk. VI. Ch. III.

Lands registered in the Land Registry.

the Registry Acts. It may be observed that since the descent of the legal estate in freeholds has been assimilated to that of chattels real (*t*), it is in most cases, if not in all (*u*), impossible for an heir of freehold lands in Middlesex or Yorkshire to convey the same to a purchaser so as to defeat the title of an executor or devisee under an unregistered will. Lands situate within the jurisdiction of the Middlesex Registry, or any of the Yorkshire Registries, become exempt from such jurisdiction on being registered under the Land Transfer Acts, 1875 and 1897, and no document relating to such lands and executed after such registration, and no testamentary instrument relating to such lands and coming into operation after such registration, need be registered in the county register (*x*). But this provision does not apply to estates and interests excepted from the effect of registration under a possessory or qualified title (*y*), or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land (*z*). If any such lands so registered in the Land Registry should afterwards be removed therefrom, they will again become subject to the jurisdiction of the county register as from the date of removal (*a*).

Lands in a district where registration

Where the land purchased is situate in a district in which registration of title is compulsory on sale, it

(*t*) Above, pp. 228, 231.

(*u*) Title must now be made through the administrator in case of intestacy: above, p. 231. But if the existence of a will were not discovered for some years after the testator's death, and the administrator had conveyed to the heir (see above, p. 233) and the heir to a purchaser, both by duly registered deed, it appears that in Middlesex the purchaser's title would prevail over that of the devisee, as in *Chadwick v. Turner*, L. R. 1 Ch. 310. So, also, in

Yorkshire, if an affidavit of intestacy had been registered (see above, p. 378); if not, *quære*.

(*x*) Stat. 38 & 39 Vict. c. 87, s. 127; 54 & 55 Vict. c. 64, First Sched. § 14; Land Transfer Rules, 1908, I. r. 48.

(*y*) See stat. 38 & 39 Vict. c. 87, ss. 8, 9; Wms. Real Prop. 645, 646, 21st ed.

(*z*) Stat. 60 & 61 Vict. c. 65, First Sched.

(*a*) Stat. 60 & 61 Vict. c. 65, s. 17 (3).

must be remembered that under the Land Transfer Act, 1897 (*b*), any conveyance on sale (*c*) executed on or after the day on which registration of title on sale was made compulsory in that district (*d*), does not pass

of title is compulsory on sale.

(*b*) Stat. 60 & 61 Vict. c. 65, s. 20 (1, 2); *Capital & Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631, 654.

(*c*) "Sale" in this enactment appears to be confined to sale strictly so called (see above, pp. 1, 266), and not to extend to

transactions in which other valuable consideration than the payment of a price in money is given for the conveyance of land, such as exchange, partition, mortgage and marriage or family settlement, and of course not to voluntary gifts.

(*d*) By Orders in Council dated the 18th July and 20th Oct. 1898, 28th Nov. 1899, 9th March and 10th Dec. 1901, and 6th March, 1902 (W. N. 23rd July and 29th Oct. 1898, 9th Dec. 1899, 23rd March and 21st Dec. 1901, and 15th March, 1902), registration of title was made compulsory on sale in the following districts comprising the county and city of London on the dates mentioned below:—

DISTRICTS.	Days of commencement of Compulsory Registration.
The parishes of Hampstead, St. Pancras, St. Marylebone and St. George's, Hanover Square	1st Jan. 1899.
The parishes of Shoreditch, Bethnal Green, Mile End Old Town, Wapping, St. George's in the East, Shadwell, Ratcliff, Limehouse, Bow, Bromley and Poplar	1st March, 1899.
The parishes of Christ Church, Southwark, St. George the Martyr, Camberwell, Horsleydown, Lambeth, Bermondsey, Newington, Rotherhithe, St. Olave and St. Thomas, St. Saviour and the detached part of the parish of Streatham situate between the parishes of Lambeth and Camberwell	1st Jan. 1900.
The parishes of Battersea, Clapham, Putney, Tooting Graveney, Wandsworth, and the remainder of the parish of Streatham	1st May, 1900.
The remainder of the county of London (except the city)	1st Nov. 1900.
The city of London	1st July, 1902.

It should be noted, however, with regard to the city of London, that an Order of Council making registration compulsory was actually in force from the 1st until the end of the 5th day of March, 1902; and it appears that conveyances executed during that time on sale of lands there situate are governed by the law so introduced: see the Orders of 10th Dec. 1901, and 6th March, 1902, cited above. As to conveyances executed on or after the 6th March, 1902, it appears that the last-mentioned Order in Council, being in effect the execution of a

the legal estate in any freehold land situate in that district to the person entitled thereunder unless or until he is registered as proprietor of the land. The expression "conveyance on sale" here means an instrument executed on sale (*e*) by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of land may be made under the Land Transfer Act, 1875 (*f*). This provision, however, does not apply in the case of the conveyance on sale of an incorporeal hereditament, or mines and minerals apart from the surface, or an undivided share in land or freeholds intermixed with and indistinguishable from lands of other tenure, or corporeal hereditaments parcel of a manor (*g*) and included in the sale of a manor as such; for nothing in the Act is to render compulsory the registration of the title to such hereditaments (*h*). And as regards land situate in a district where registration is compulsory, an assign-

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power of legislation conferred by statute, would take effect from the first instant of that day, and would operate as a revocation of the previous Order: see stat. 60 & 61 Vict. c. 65, s. 20 (1, 3); *Tomlinson v. Bullock*, 4 Q. B. D. 230.

(*e*) See last note but one.

(*f*) Stat. 60 & 61 Vict. c. 65, s. 20 (2). To be entitled to make such an application, a person must have contracted to buy, or be entitled at law or in equity to, or be capable of disposing by way of sale of, an estate in fee simple in the land for his own benefit, whether subject to incumbrances or not; and if he apply as purchaser the vendor must consent to the application; or he must hold the land on trust for sale or be a trustee, mortgagee, or other person having power of sale thereof (including a tenant for life or other person having the power of sale given by the Settled Land Acts), and the persons (if any) whose consent is required to the exercise of the trust or power of sale must consent to the application; or any two or more persons must be entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights, or interests in the land as would if vested in one person entitle him to be registered as proprietor: stats. 38 & 39 Vict. c. 87, ss. 5, 68, 69; 60 & 61 Vict. c. 65, ss. 6, 14 (1), and First Schedule; Wms. Real Prop. 636, 637, 647, 648, 21st ed.

(*g*) This includes lands held of the manor as copyhold or as customary freehold where the freehold is in the lord, but not lands held of the manor by free tenure: Wms. Real Prop. 421, 422, 463—467, 21st ed.; Williams on Seisin, 30.

(*h*) Stat. 60 & 61 Vict. c. 65, s. 24.

ment on sale of a lease or underlease having at least forty years to run or two lives yet to fall in, and a grant of a lease or underlease for a term of forty years or more, or for two or more lives, executed after the day on which registration was made compulsory in that district, and capable of registration (*i*), operates only as an agreement, and does not pass any legal estate to the assignee or lessee unless or until he is registered as proprietor of the lease or underlease (*k*). The expressions "assignment" and "grant of a lease or underlease" here apply to any instrument by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of leasehold land may be made, not being an assignment or surrender to the owner of the immediate reversion executed on or after the 1st of January, 1909, and containing a declaration that the term is to merge in such reversion (*l*). A term created for mortgage purposes

(*i*) See note (*l*) below as to what leases are capable of registration.

(*k*) Land Transfer Rules (1903), r. 69, further providing that, where the assignees or lessees shall be the trustees of a settlement for the purposes of the Settled Land Acts, 1882 to 1890, or any of them, nothing in this rule shall prevent the legal estate in the land from passing to the trustees, provided that the tenant for life or person having the powers of a tenant for life under the settlement be registered as proprietor of the land comprised in the assignment or lease within one calendar month from the date thereof, or within such further time as the registrar shall allow. See stat. 60 & 61 Vict. c. 65, s. 6; Wms. Real Prop. 646—648, 21st ed.

(*l*) Land Transfer Rules (1903), r. 70, as amended by L. T. R. (1908), IV. The conditions required to entitle a person to make

such an application are the same as in the case of freehold land (above, p. 382, n. (*f*)), except that for an estate in fee simple there is substituted any leasehold land held under a lease which is either immediately or mediately derived out of land of freehold tenure and is for or determinable on a life or lives or for a term of years of which more than twenty-one are unexpired; but a term created for mortgage purposes is not to be deemed a lease within the meaning of these provisions, and nothing in the Land Transfer Act, 1897, is to render compulsory the registration of the title to a lease having less than forty years to run or two lives yet to fall in: stats. 38 & 39 Vict. c. 87, ss. 2, 11; 60 & 61 Vict. c. 65, ss. 14, 24, and First Schedule; Land Transfer Rules (1903), 51—67; L. T. R. (1908), I. 18, II., III.; Wms. Real Prop. 636, 673, 21st ed.

is not capable of registration under the Land Transfer Acts (*m*), so that the above provisions do not affect the grant of such a term. And it appears that they do not affect an assignment on sale of a term originally created for mortgage purposes, for the "assignment" mentioned therein must confer or complete a title under which an application for registration as first proprietor of leasehold land may be made, and the owner of a term *created* for mortgage purposes is not entitled to make such an application. Here it may be noticed that the exact scope of the expression "term created for mortgage purposes" is doubtful. It certainly includes the term created on a mortgage of leaseholds by demise, but it is questionable whether it extends to a term limited by a settlement to trustees on the usual trusts to raise portions for younger children, such trusts being to raise the portions not only by mortgage, but also by sale of timber or minerals, or out of the rents and profits, or by any other reasonable means (*n*). If on the purchase of land situate in a district where registration is compulsory, title be deduced under a conveyance on sale, or a grant or an assignment of a lease, which is affected by the above provisions, it must be ascertained that the purchaser, lessee, or assignee, was duly registered as proprietor of the land, or the legal estate must be required to be got in from the vendor, lessor, or assignor or his representatives, and the title thereto required to be deduced accordingly. And if the land should not have been registered since registration was made compulsory in the district, it must be remembered that the purchaser must himself be registered as proprietor of the land before he can acquire the legal estate on completion of the purchase. The expense of such registration will apparently fall on the purchaser,

(*m*) Stat. 60 & 61 Viet. c. 65,
First Schedule.

(*n*) See Wms. Real Prop. 632,
633 and n. (*n*), 21st ed.; 45 Sol.
J. 357.

in the absence of special stipulation, under the general principle that the purchaser must bear the expense of the conveyance to himself of the property sold (*o*). It appears, however, that in the absence of stipulation it is the vendor's duty to procure the purchaser to be registered as proprietor; for the general rule is that the vendor must *make* the conveyance—*i.e.*, do all acts necessary to pass the legal estate—though the purchaser must pay for the conveyance (*p*); and in the present case the legal estate cannot pass until registration. For the same reasons, it does not appear that the vendor can claim payment of the purchase money before the purchaser's registration, the rule being that payment can only be demanded on conveyance of the estate (*p*). When unregistered land situate in a com-

(*o*) Sug. V. & P. 561; Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.

(*p*) See below, Chap. XII., §§ 1, 5; Chap. XX. It is submitted that the case is not parallel to that of the conveyance of land in a register county, when the legal estate passes by the deed of conveyance: above, p. 374. In L. Q. R. xx. 97, the learned reviewer of the first edition of this book challenged the correctness of the statement in the text, and compared the case to that of a tenant in tail selling the fee simple, when (he suggested) the duty of enrolling a conveyance made by way of disentailing assurance rests on the purchaser. With great respect for this opinion, the author is constrained to adhere to the view above expressed; and he submits that the case of a sale by a tenant in tail is different. The effect of stat. 3 & 4 Will. IV. c. 74, ss. 15, 41, appears to be that the grantee of an estate in fee simple under a disentailing deed executed by the tenant in tail obtains the legal estate in fee simple on the execution of the deed, subject to a con-

dition subsequent reducing the assurance, in case of non-enrolment within due time, to such a conveyance as the tenant in tail could make at common law; see *Whitmore-Searle v. Whitmore-Searle*, 1907, 2 Ch. 332. And even at common law the grantee would take a fee simple defeasible by the entry of the issue in tail: *Doe d. Neville v. Neville*, 7 T. R. 276; *Doe d. Gregory v. Whichelo*, 8 T. R. 211, 214; Wms. Real Prop. 108 and n (*n*), 21st ed. Besides, the fact that the tenant in tail is bound to pay the costs of enrolment (below, Chap. XII. § 4), appears to show that the duty of *procuring* the enrolment (as being an act without which he cannot convey the estate he has sold and so a step in the vendor's title) really lies on the vendor. So in the case of the sale of land in a compulsory registration district it is submitted that the registration of the purchaser is an act without which the vendor cannot convey to the purchaser the estate contracted for, and is equally a step in the vendor's title to convey what he has contracted to sell

Sale of leaseholds in compulsory district.

Priority notice in favour of the purchaser's application for first registration.

pulsory district is sold, the vendor generally desires that the purchase money shall be paid on the execution by him of a deed of conveyance in the old form, which, of course, only passes an equitable estate to the purchaser, and that the purchaser shall then complete his title by registering himself. But to obtain this it appears necessary to make special stipulations to that effect in the contract for sale. It is also desirable, in the vendor's interest, to stipulate that the purchaser *shall* procure the registration of the title within a specified time, in order that the legal estate and any liabilities attached to the legal ownership of the land may not remain outstanding in the vendor for an indefinite period. This is especially necessary where the vendor of leasehold land situate in a compulsory registration district is himself an assignee of the lease, under which the property is held ; as he remains subject to the rent and covenants of the lease until he has parted with the legal estate in the term granted (*q*). Forms of the special stipulations appropriate on the sale by auction of unregistered land situate in a compulsory registration district are given in the Appendix (*r*). The purchaser of such land may lodge at the Office of Land Registry a priority notice in favour of his application to be registered as first proprietor thereof ; and if within fourteen days after the lodgment of the notice, or such further time as the registrar shall think fit, an application shall be made in accordance with the notice

(see above, p. 94 . But the main point is that in this case (unlike that of a purchase from a tenant in tail or of land in a register county) the purchaser can only obtain an equitable estate by the conveyance to him by deed of the land sold, and holds therefore, prior to the completion of his title by registration, subject to all equitable interests (if any) created pre-

viously to his own in the property purchased, whether he has notice of such prior interests or not (see below, § 10 of this chapter). It is submitted that he cannot be obliged to part with his purchase money against a conveyance of this kind, unless he be bound by express stipulation to do so.

(*q*) See Wms. Real Prop. 511, 512, 21st ed.

(*r*) Appendix A., below.

and accompanied by the official acknowledgment of the notice, it will be dealt with in priority to any other application affecting the same land which may have been made in the meantime (*s*). Where a purchaser of unregistered land situate in a compulsory registration district desires to make an immediate disposition thereof by way of registered transfer or charge, he is under the Land Transfer Rules (1903) (*t*) enabled to do so before he is himself registered as proprietor: but a question has been raised whether such a transfer or charge will convey any legal estate or interest if the purchaser be not himself registered as proprietor of the land (*u*). It appears, therefore, that any one who proposes to take a registered transfer or charge from such a purchaser should insist on the purchaser being registered as proprietor before the intended transfer or charge is completed; and this is especially necessary where the registration of the proprietorship of the land is to be made with possessory title only. The subject of the purchase to be followed by an immediate mortgage of unregistered land, which is situated in a compulsory registration district, is considered in the chapter on the sale of registered land (*x*).

Registered transfer or charge by the purchaser before his own registration.

It has been suggested (*y*) that the provisions of the Land Transfer Act, 1897 (*z*), as to compulsory registration on sale may be evaded in this way:—Let it be stipulated in the contract for sale that, on payment of the purchase money, the vendor shall execute a deed declaring himself a trustee for the purchaser and his heirs, and giving to the purchaser power to remove him

Suggested evasion of the compulsory registration enactment.

(*s*) Land Transfer Rules (1903), 95.

(*t*) Rule 96; see below, Chap. XX.: Wms. Real Prop. 648—656, 662, 673, 21st ed.

(*u*) Brickdale & Sheldon, Land Transfer Acts, 396, 397, 2nd ed.

(*x*) Below, Chap. XX. at end.

(*y*) Brickdale & Sheldon, Land Transfer Acts, 313, 1st ed.: 339, 2nd ed.

(*z*) Stat. 60 & 61 Vict. c. 65, s. 20; above, pp. 381, 382.

from the trusteeship and appoint a new trustee in his place, and shall put the purchaser into possession of the property sold. Let the purchaser take possession on completion and afterwards execute a deed removing the vendor from the trusteeship, appointing some nominee of his own trustee in the vendor's place, and vesting the land in the new trustee. Then let the purchaser call upon this trustee to convey to him the legal estate in the land, and let the same be conveyed to him accordingly. There certainly seems to be good ground for contending that neither the deed appointing the new trustee nor the deed of conveyance from the new trustee to the purchaser himself is "an instrument executed on sale" within the meaning of the enactment in question (*a*), for when the price was paid, the first deed executed, and the purchaser put into possession, the contract of sale would have been completely discharged on both sides by performance of all the obligations thereby undertaken (*b*). But this plan is open to the very serious objection that the purchaser parts with the whole of the purchase money against the conveyance to him of a merely equitable estate. It is never safe for a purchaser to do this, because in that event he takes subject to all equitable interests (if any) affecting the land and created previously to his own, and this is equally the case whether he has or has not notice of such prior interests (*c*).

Successive purchases of several undivided shares.

It is a question whether registration of the title is necessary to pass the legal estate on the completion of the last of several successive purchases of undivided shares (together making the entirety) of unregistered land situate in a compulsory registration district. The enactment as to compulsory registration applies to every

(*a*) Above, p. 382.

(*b*) See below, Chap. XVIII. § 1.

(*c*) See above, p. 386, n. (*p*); below, § 10 of this chapter.

instrument executed on sale whereby a title to apply for first registration is conveyed *or completed*: but nothing in the Act is to render compulsory the registration of the title to an undivided share in land (*d*).

There seems to be no doubt that the conveyance by deed on purchase of an undivided share in unregistered land situate in a compulsory registration district passes the legal estate, so long as there is not conferred or completed by virtue thereof a title to apply for first registration of something more than an undivided share in land. Thus, if A. be the owner of one-half of Blackacre, and the other half belong to X., and B. purchase A.'s moiety, it seems clear that a deed of grant by A. of his moiety to B. in fee simple would pass the legal estate therein to B. Then suppose that after this B. purchase X.'s moiety, and X. convey it to him by deed, is B. obliged to register his title to this moiety in order that he may acquire the legal estate therein? This can only be necessary if the deed can rightly be described as an instrument by virtue whereof there is completed in B. a title to apply for registration in respect of some property, which is not an undivided share in land. But this does not appear to be the case. B.'s title to apply for registration in respect of the moiety purchased from A. was entirely completed when A. conveyed it to him (*e*); so that the deed of grant from X. to B. could only complete B.'s title, which was *conferred* by the contract of sale, to be registered as proprietor of X.'s moiety. And it seems clear that in any case, non-registration of B.'s title to X.'s moiety could not possibly avoid or impair the legal estate, which B. had already obtained in A.'s moiety. If so, how can it be necessary for B. to register his title to X.'s moiety, as a condition precedent to his obtaining the legal estate

Conveyance on purchase of an undivided share alone.

Purchase of undivided shares from different owners.

(*d*). Above, p. 382.

(*e*). See stat. 60 & 61 Vict. c. 65,

s. 14 (1), allowing the registration of undivided shares in land.

Successive purchases of undivided shares from the owner of the entirety.

therein, when it is expressly enacted that nothing contained in the Land Transfer Act, 1897, shall render compulsory the registration of the title to an undivided share in land (*g*)? If B. were obliged to register his title to X.'s moiety in order to gain the legal estate, then it certainly would be compulsory to register the title to an undivided share in land. If this reasoning be right, there seems to be no difference between the example given and the case where A. is the owner of the whole of Blackacre and B. buys of him (say) nine-tenths for 900*l*. and afterwards contracts to purchase the remaining tenth for 100*l*. And it appears that the deed of grant of the remaining tenth would only complete B.'s title to be registered as proprietor of that tenth, and would not confer on or complete in him any title to be registered as proprietor of the nine-tenths which he bought under a separate and prior contract. In the absence, however, of any judicial decision on these points, it would hardly be safe to accept a title depending on the conveyance by deed alone of the remaining undivided share or shares to one who was already seised of some undivided share in unregistered land situate in a compulsory registration district (*h*). Thus if in either of the examples given B. omitted to register his title to the share last conveyed to him, it would not be satisfactory for a purchaser from him to accept his title to the entirety of Blackacre without submitting the question of his being seised of the whole legal estate to the decision of the Court; though the

(*g*) Stat. 60 & 61 Vict. c. 65, s. 24; above, p. 382.

(*h*) The argument in favour of the necessity of registration would be that by the conveyance of the last remaining share the title to apply for registration in respect of the whole property is completed. But even if this be admitted, it is difficult to see how registration of title could be

required to pass the legal estate in that share, without depriving of all meaning the proviso that the Act is not to render compulsory the registration of the title to an undivided share in land. For it seems impossible to contend that, to effect this result, registration of the title to *the whole* property would be necessary.

purchaser would have to pay the costs of the application if the Court should decide in favour of the title. If in the cases put, the conveyance of the remaining half or tenth share were taken to the use of a trustee in fee simple in trust for B., there would be further ground for contending that the legal estate would pass without registration of the title; for there would then be no merger of the undivided shares acquired by B., his title to registration as beneficial owner of the half or tenth share last acquired would remain separate and distinct from his title as legal owner of the other moiety or nine-tenth shares, and there would not at any time have been completed in him one title of the same kind (such as tenancy of the legal estate in fee simple) to apply for the first registration of the entirety of the land. But in this case also it would scarcely be prudent for a purchaser from B. to accept the title without a judicial decision in its favour. If, however, it should be held that in these instances the conveyance of the undivided share last assured passes the legal estate without registration of the title, it would be difficult to maintain that there is any difference in the case where a contract to buy the whole of Blackacre at one price is by mutual assent completed by the conveyance of one-half on Monday and of the other half on Tuesday. It is true that in this case (unlike the others) a title to apply for registration in respect of the whole of Blackacre is *conferred* by the contract for sale, so that it may well be argued that this title is *completed* by the conveyance of the second moiety (*i*). But it appears that in this case also the conveyance of the moiety first assured would irrevocably pass the legal estate therein to the purchaser (*k*). If then he should be obliged to register his title to the second moiety in order to acquire the legal

Completion
of a contract
to buy the
entirety by
successive
conveyances
of undivided
shares.

i, See above, pp. 382, and n. (*f*), 390, n. (*h*).
k, Above, p. 389.

estate therein, the Act would (contrary to its own express words) render compulsory the registration of the title to an undivided share in land (*l*).

Suggested scheme for avoiding registration of title in a compulsory district.

If any purchaser of unregistered land situate in a compulsory district should desire to avoid registration of his title at all costs and to leave no stone unturned to secure an unimpeachable title, he might adopt the following plan:—Contract to buy (say) $\frac{999}{1000}$ th undivided shares of Blackacre for 999*l.* with an option to be exercised within four weeks after completion to purchase the remaining $\frac{1}{1000}$ th share for 1*l.*, such option if exercised to be completed by deed declaring the vendor a trustee for the purchaser and empowering the purchaser to remove him and appoint new trustees in his place (*m*). Complete the sale of the $\frac{999}{1000}$ ths by deed of grant, which should also contain the terms of the option (*n*). After this, exercise the option to buy the remaining $\frac{1}{1000}$ th share and complete that sale in the manner provided. Let the purchaser subsequently appoint new trustees and vest the $\frac{1}{1000}$ th share in them, and let them convey the legal estate therein to him. This plan would enable the purchaser to obtain the legal estate in all but a very small share of the property proposed to be sold before parting with the bulk of his purchase money, and would make use of every possible precaution against the necessity of registering the title to the last $\frac{1}{1000}$ th share (*o*). And it is thought that this plan would prove to be effective.

Lands forming part of Bedford Level.

Conveyances of lands forming part of the great level of the Fens called Bedford Level are valid, although

(*l*) See above, pp. 389, 390, n. (*h*).

(*m*) See above, pp. 387, 388.

(*n*) The object of this is that it may appear on the face of the title deeds that no title to apply for registration in respect of the

last $\frac{1}{1000}$ th share, and consequently of the whole property, was conferred on the purchaser previously to the exercise of his option to buy that share; see above, pp. 389, 390, n. (*h*), 391.

(*o*) See above, pp. 388 *sq.*

not registered in the Bedford Level Office, for all purposes except for entitling the grantees to the privileges conferred by the Bedford Level Act (*p*) on the owners of such lands and for the other purposes of the Act (*q*).

§ 4.—*Voluntary Conveyances.*

Voluntary conveyances, and conveyances revocable by the grantor, of any estate in lands or other hereditaments were liable to be defeated (*r*), before the 29th of June, 1893 (*s*), by a subsequent conveyance thereof by the grantor (*t*) for any valuable consideration; but this doctrine was not applied to voluntary conveyances in favour of a charity (*u*). And if the grantee under the voluntary conveyance disposed of the lands for valuable consideration the voluntary conveyance could no longer be so defeated by the grantor (*v*). Voluntary conveyances of lands, and also of goods, are voidable if they tend to defeat or delay creditors, as against the grantor's creditors seeking to take the lands or goods in execution in his lifetime, or to make the same applicable in payment of his debts after his death, or as against the trustee in the event of his bankruptcy (*y*). And

Voluntary conveyances—

In favour of a charity.

Voluntary conveyances tending to defeat or delay creditors.

(*p*) Stat. 15 Car. II. c. 17.

(*q*) *Willis v. Brown*, 10 Sim. 127.

(*r*) Under the judicial construction of stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31, and avoiding conveyances made with intent to defraud subsequent purchasers; see Sug. V. & P. 712 *sqq.*; 2 Dart, V. & P. 889 *sq.*, 5th ed.; 1003 *sq.*, 6th ed.; 914 *sq.*, 7th ed.; Wms. Real Prop. 79, 21st ed.

(*s*) The date of the passing of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), providing that voluntary conveyances, if in fact made *bonâ fide* and without any fraudulent intent, should no longer be deemed

fraudulent within the meaning of stat. 27 Eliz. c. 4, or be defeated thereunder.

(*t*) Not by his heirs or assigns: *Doe d. Newman v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132, 150; unless actually fraudulent: see Sug. V. & P. 713; 2 Dart, V. & P. 902, 5th ed.; 1021, 6th ed.; 931, 7th ed.

(*u*) *Ramsay v. Gilchrist*, 1892, A. C. 412.

(*v*) *Prodgers v. Langham*, 1 Sid. 133; Sug. V. & P. 719, 720; 2 Dart, V. & P. 901, 5th ed.; 1019, 6th ed.; 929, 7th ed.

(*y*) Stat. 13 Eliz. c. 5; *Taynor's Case*, 3 Rep. 81 a; 1 Smith, L. C. 1; *Richardson v. Smallwood*, Jac. 552; *Re Ridler*, 22 Ch. D. 74;

Bankruptcy
within two or
ten years
thereafter.

voluntary conveyances of any property are voidable under the Bankruptcy Act, 1883 (z), as against the trustee in the grantor's bankruptcy, if the grantor become (a) bankrupt within two years thereafter; and such conveyances are further so voidable if the grantor become (a) bankrupt within ten years thereafter, unless it can be shown that at the time of making the conveyance he was able to pay all his debts without the aid of the property so conveyed. But if the grantee under the voluntary conveyance dispose of the lands or goods to a *bonâ fide* purchaser for valuable consideration, the purchaser's title cannot be displaced by the creditors or trustee in bankruptcy of the maker of the voluntary conveyance (b). It appears however that, in order to escape the operation of the above provisions of the Bankruptcy Act, 1883 (z), the disposition in favour of the *bonâ fide* purchaser must be made before the grantor, who executed the voluntary conveyance,

2 Dart, V. & P. 905-910, 5th ed.; 1024-1030, 6th ed.; 934-942, 7th ed.; Williams on Settlements, 362, 363; see *Re Johnson*, 20 Ch. D. 389; *Re Holland*, 1902, 2 Ch. 360; *Mackelvey v. Smith*, 1903, 1 K. B. 671.

(z) Stat. 46 & 47 Vict. c. 52, s. 47. Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, voluntary conveyances by traders were similarly voidable. Voluntary conveyances are not so voidable under the Act of 1883 if the grantor die insolvent, but not bankrupt, and his estate be administered in bankruptcy after his death: *Ex parte Official Receiver, re Gould*, 19 Q. B. D. 92.

(a) A debtor becomes bankrupt at the exact moment of time when he commits the act of bankruptcy (if only one) on which a receiving order is subsequently made against him, or the first of several acts of bankruptcy, which shall be proved to have been

committed by him within three months before the presentation of the bankruptcy petition on which such an order shall be made: stat. 46 & 47 Vict. c. 52, s. 43, amended by 53 & 54 Vict. c. 71, s. 20; Wright, J., *Re Reis*, 1904, 1 K. B. 451, 455 (whose judgment on this point is not affected by the overruling of his decision on the main question in the case; see *S. C.*, 1904, 2 K. B. 769; 1905, A. C. 442); *Ponsford, Baker & Co. v. Union of London & Smiths Bank*, 1906, 2 Ch. 440; *Re Bumpus*, 1908, 2 K. B. 330; Wms. Pers. Prop. 266-269, 16th ed.

(b) See *Halifax Joint Stock Banking Co. v. Gledhill*, 1891, 1 Ch. 31, as to stat. 13 Eliz. c. 5; and as to the Bankruptcy Act, 1883, *Re Vansittart*, 1893, 2 Q. B. 377; *Re Brall*, ib. 381; *Re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776.

becomes bankrupt (*c*). It was held that, on a voluntary assignment of leaseholds subject to the payment of rent and performance of onerous covenants, the liability so incurred by the assignee was sufficient consideration to save the assignment from being defeated by a subsequent assignment for value (*d*); but this liability does not preserve a voluntary assignment of leaseholds from avoidance by the assignor's creditors or trustee in bankruptcy (*e*). Where title is made under a voluntary conveyance, followed by a conveyance for valuable consideration made by the grantee, the mere fact that the voluntary conveyance was voidable in the interval is not an objection to the title (*f*). But the purchaser is, as we have seen (*g*), entitled to require evidence that the voluntary conveyance was not avoided by a subsequent conveyance for valuable consideration, or otherwise: though after long continued possession in accordance with the title under the voluntary conveyance, it will be presumed that it was not so avoided (*h*). Similarly, where title is made under the avoidance prior to the 29th of June, 1893, of a voluntary conveyance by a subsequent conveyance by the grantor for valuable consideration, it does not appear to be a fatal objection that, in the interval, the voluntary conveyance may have ceased to be defeasible (*i*); but the purchaser is

Voluntary conveyance of leaseholds.

Proof that a voluntary conveyance has not been avoided.

(*c*) See the last three cases cited in the previous note, and the last note but one.

(*d*) *Price v. Jenkins*, 5 Ch. D. 619; *Harris v. Tubb*, 42 Ch. D. 79.

(*e*) *Ex parte Hillman, re Pamfrey*, 10 Ch. D. 622; *Re Radler*, 22 Ch. D. 74.

(*f*) *Noyes v. Paterson*, 1894, 3 Ch. 267.

(*g*) Above, p. 133.

(*h*) *Re Mauch and East Grinstead*, 24 Ch. D. 11, 19.

(*i*) 2 Dart. V. & P. 999, 5th ed.; 1119, 6th ed.; 1033, 1034, 7th ed. Before the Voluntary Conveyances Act, 1893 above, p. 393, n. (*s*), if a man agreed to

sell lands with the intention of defeating a voluntary conveyance thereof previously made by him, the Court would not enforce the specific performance of the contract against an unwilling purchaser at the vendor's suit: *South v. Garland*, 2 Mer. 123; *Johnson v. Legard*, T. & R. 281; *Clarke v. Willott*, L. R. 7 Ex. 313; see *Peter v. Nicholls*, L. R. 11 Eq. 391, depending on very peculiar circumstances. But the Court would specifically enforce the contract at suit of the purchaser: *Buckle v. Mitchell*, 18 Ves. 100; *Rosher v. Williams*, L. R. 20 Eq. 210.

Liability to
estate duty
after a
voluntary
conveyance.

entitled to require evidence that it did not so cease to be defeasible, though this would be presumed from long continued possession under the title given by the avoiding conveyance for value. Since voluntary conveyances have ceased to be defeasible by subsequent conveyances for valuable consideration, it has been held that a grantee of lands under a voluntary conveyance may oblige a purchaser from him to perform the contract specifically, as the purchaser will obtain a title paramount to the claims of the creditors or trustee in bankruptcy of the maker of the voluntary conveyance (*k*). Under the Finance Act, 1894 (*l*), as amended by the Finance (1909—10) Act, 1910 (*m*), if a voluntary conveyance be not made *bonâ fide* three years before the grantor's death, or if *bonâ fide* possession be not assumed by the grantee under a voluntary conveyance immediately upon the making thereof, and thenceforward retained, to the entire exclusion of the grantor, or of any benefit to him by contract or otherwise, or if a voluntary conveyance reserve a life interest or power of revocation to the grantor, estate duty will be payable at his death in respect of the property conveyed. If however any property taken under such a conveyance would be so chargeable with estate duty by reason only that it was not, as from the date of the conveyance,

(*k*) *Re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776; above, p. 394.

(*l*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2 (1 *c*); see the chapter on the Death Duties in vol. ii.

(*m*) Stat. 10 Edw. VII. c. 8, s. 59 (1), substituting the period of three years for that of twelve months (the period originally specified in the Act of 1894) with regard to grantors dying on or after the 30th April, 1909, but not applying to any voluntary conveyance made before the 30th April, 1908, or made or effected for public or charitable purposes.

By sub-sect. 2, the enactments making gifts *inter vivos* so chargeable with estate duty are not to apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the Inland Revenue Commissioners to have been part of the normal expenditure of the deceased and to have been reasonable, having regard to the amount of his income or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate 100% in value or amount.

retained to the entire exclusion of the grantor and of any benefit to him by contract or otherwise, it will not be chargeable with estate duty if subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the grantor and of any benefit to him by contract or otherwise for three years prior to his death (*n*). Purchasers of lands from the grantees under voluntary conveyances should have regard to this liability, and require to be satisfied that the grantor lived for three years (*o*) at least after the making of the voluntary conveyance, or (if not) that the estate duty (which falls upon the grantee) has been discharged, and also that the conveyance was not attended by any other circumstance which would make the lands chargeable with estate duty (*p*). Since the passing of the Finance Act, 1894, many voluntary conveyances have been made with the object of escaping the liability to pay estate duty on the grantor's death. Under the Finance (1909—10) Act, 1910 (*q*), voluntary conveyances executed on or after the 29th of April, 1910, are chargeable with the like stamp duty as if

Stamp duty
on voluntary
conveyances.

(*n*) Stat. 10 Edw. VII. c. 8, s. 59 (3).

(*o*) Or if the conveyance was made before the 30th April, 1908, for one year: see last note but one.

(*p*) See *A.-G. v. Earl Grey*, 1898, 1 Q. B. 318, 2 Q. B. 534; 1900, A. C. 124.

(*q*) Stat. 10 Edw. VII. c. 8, s. 73 (1, 2) (passed 29th April, 1910). This section does not apply to a conveyance operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of the nation. And by sub-sect. 6,

a conveyance made for nominal consideration for the purpose of securing the repayment of an advance or loan, or made for effectuating the appointment of a new trustee, or the retirement of a trustee, whether the trust is expressed or implied, or under which no beneficial interest passes in the property conveyed, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, expressed or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, shall not be charged with duty under this section, notwithstanding that the circumstances exempting the conveyance from charge under this section are not set forth therein.

they were conveyances on sale (*r*), with the substitution of the value of the property conveyed for the amount or value of the consideration for the sale; and the stamp must be adjudicated.

§ 5.—*Sale of Ground Rents, Reversions and Remainders, Mines, Roads, Rivers, &c.*

Purchase of
ground rents.

Ground rent.

The property commonly described as freehold or leasehold ground rents is nothing else than the freehold or leasehold reversion expectant on the determination of a building lease (*s*); and the purchaser of a freehold or leasehold ground rent described as such is entitled to have conveyed to him such a freehold or leasehold reversion expectant on a lease reserving a ground rent (*t*) as will enable him to distrain and pursue the other usual lessor's remedies for recovery of the rent (*u*). The points to be attended to on behalf of the purchaser of such property are, first, to see that he gets the reversion on the lease, so as to be enabled to enforce all the lessor's remedies, whether by distress, action on the

(*r*) That is, where the value of the property conveyed does not exceed 500*l.* and the instrument of conveyance contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value of the property conveyed exceeds 500*l.*, at the rate of 6*d.* for every 5*l.* or fraction thereof up to 25*l.*, 2*s.* 6*d.* for every 25*l.* or fraction thereof up to 300*l.*, and above 300*l.*, 5*s.* for every 50*l.* or fraction thereof; and in all other cases at double those rates; see stats. 54 & 55 Vict. c. 39, ss. 1, 14, 54–61, and First Schedule; 58 Vict. c. 16, Part II.; 10 Edw. VII. c. 8, s. 73; Wms. Real Prop. p. 615, n. (*p*), 21st ed.; below, Chap. XII. § 3. Voluntary conveyances made by deed executed before the 29th April, 1910, were subject to a

stamp duty of 10*s.* only; stat. 54 & 55 Vict. c. 39, s. 1, and First Schedule, tit. Deed, replacing 33 & 34 Vict. c. 97, s. 3, and Schedule.

(*s*) *Maundy v. Maundy*, 2 Str. 1020.

(*t*) Ground rent properly means the rent at which land is let for the purpose of improvement by building. Thus, it conveys the idea of something less than the rack rent, and a purchaser of a ground rent described as such without further explanation will not be compelled to accept a rack rent: *Stewart v. Alliston*, 1 Mer. 26; *Bartlett v. Salmon*, 6 De G. M. & G. 33, 41; 1 Dart, V. & P. 123, 5th ed.; 138, 6th ed.; 135, 7th ed.

(*u*) *Lecoy v. Mogford*, 2 Jur. N. S. 1084; *Langford v. Selmes*, 3 K. & J. 220; *Evans v. Robins*, 8 Jur. N. S. 846; cf. *Smith v. Watts*, 4 Dr. 338.

lessee's covenants, or re-entry, for non-payment of the rent reserved and breach of the lessee's covenants; and secondly, to ascertain that the vendor has been in actual receipt of the rents, the right to which constitutes the profitable part of the thing sold. Whether the first of these requirements is fulfilled will of course appear from the usual investigation of the documentary title; the second is necessary to ensure that the purchaser is not getting a paper title and nothing more. The title which ought to be abstracted on the purchase under an open contract of a reversion expectant on a lease for years has been already shown (*x*). If the lease be more than forty years old, the title to the reversion, if freehold, must be carried back so as to show that the lease was well granted. If the reversion sold be leasehold, the title should of course commence with the lease, under which the reversion is derived (*y*). The vendor of a reversion on a lease is under no obligation to deduce the title under the lease so as to prove who is the assignee thereof or person entitled thereunder at the time of sale; it is sufficient if he show that there is a person in possession paying to him the rent reserved on the lease (*z*). The purchaser should of course inquire who is in possession of the property demised under the lease on which he is purchasing the reversion, and should ask the person so ascertained to be in possession as to the extent of his interest in the property (*a*), and also whether he has been paying rent to the vendor. If such person be not the actual occupant of the property, inquiry should be made of the occupant as to the nature of his interest in the property, and to whom he pays rent (*b*). A tenant or occupant is not bound to answer

Inquiries on purchase of the reversion on a lease.

(*x*) Above, pp. 97, 101, 102.

(*y*) Above, p. 101.

(*z*) *Hunt v. Woodro*, 9 Hare. 618, 621.

(*a*) If he omit this, he will take with notice of such interest: see

Hunt v. Lock, 1901, 1 Ch. 45, 49; Chap. XII, § 2, below.

(*b*) If the occupant should not be paying rent to the vendor's tenant, the inquiry should be pursued until all the links of the

any inquiry to whom he pays his rent (*c*): but where the inquiry is made in connection with the purchase of the reversion, the information sought is in most cases not likely to be withheld. If it should be refused, it is submitted that the vendor would be bound to furnish some other evidence of his receipt of the rent sold. This is merely equivalent to the duty of a vendor of land in possession to produce land corresponding with that described in the contract for sale (*d*); and it is obvious that for the purchaser to dispense with such evidence would be to run the risk of the vendor's title having been extinguished by payment of the rent for twelve years or more to some person wrongfully claiming to be entitled to the land in reversion (*e*).

Sale of land leased for years, where succession duty payable at end of lease.

Where the reversion in fee simple on a lease for years is sold free from incumbrances as a property to be immediately enjoyed and without any special stipulation as to payment of succession duty, and it turns out that the property will be subject to a liability to pay succession duty on the expiration of the lease (*f*), the vendor must (if he can) procure the duty to be commuted at his own expense, or the purchaser will be at liberty to reject the title (*g*); and the purchaser is not

chain between the vendor and the occupant have been discovered.

(*c*) *Hunt v. Luck*, 1901, 1 Ch. 45, 53.

(*d*) See above, pp. 33, 43.

(*e*) Stats. 3 & 4 Will. IV. c. 27, ss. 9, 34; 37 & 38 Vict. c. 57, ss. 1, 9; see *Doe d. Angell v. Angell*, 9 Q. B. 328, 355—359; *Williams v. Pott*, L. R. 12 Eq. 149. But in the case of mere non-payment of the rent for twelve years or more the vendor's title will not have been affected, though the arrears recoverable will be limited: see *Grant v. Ellis*, 9 M. & W. 113, 126, 127; *Archbold v. Sculby*, 9 H. L. C. 360, 375; Wms. Real Prop. 581, 583, and

n. (*h*), 21st ed. As to the case in which a good title has been acquired under the Statute of Limitations as against the lessee, see *Walter v. Yalden*, 1902, 2 K. B. 304.

(*f*) Where a succession consists of a beneficial interest in possession in lands let at a ground rent by a lease not granted by the successor himself, the succession duty in respect of the increased value accruing on the determination of the lease need not be paid till then; stat. 16 & 17 Vict. c. 51, s. 20; see the chapter on the Death Duties in vol. ii.

(*g*) *Re Kidd and Gibbon's Contract*, 1893, 1 Ch. 695.

obliged to accept the vendor's covenant of indemnity against this liability, however small it may be (*h*).

Whenever it appears, on the investigation of the title to lands let at a ground rent, that succession duty has become payable since the commencement of the lease, the purchaser's advisers should be careful to ascertain whether the Crown's claim has been entirely satisfied or whether the duty payable in respect of the increased value to accrue on the determination of the lease has been left outstanding till then (*i*). When the reversion on a lease at a ground rent is subject to such a liability and is proposed to be sold, special stipulation must be made, if it be intended that the purchaser shall himself discharge the duty to become payable on the expiration of the lease. The purchaser of the reversion on a lease will of course have to bear any reversion duty which may become payable on the determination of the lease (*k*); and there is no need for the vendor of such a reversion to make any mention of this liability, which is now a legal incident of such property, like land tax or tithe rentcharge (*l*).

Purchaser should ascertain whether any duty so remains payable.

Reversion duty.

Here the reader may be reminded that by a grant of the freehold reversion on a lease for years the rent reserved (which is incident to the reversion) passes to the grantee at common law, and, since statute 4 & 5 Anne, c. 3 (*m*), without the necessity of any attornment by the tenant; and the grantee may distrain or sue for the rent accordingly (*n*). By statute 32 Hen. VIII.

Effect of grant of reversion.

(*h*) *Re Weston and Thomas's Contract*, 1907, 1 Ch. 244; see below, Chap. XII. § 4.

(*i*) See the three preceding notes.

(*k*) See Stat. 10 Edw. VII. c. 8, ss. 13, 14, 22 (1). And the purchaser of the reversion on a mining lease will have to bear

the mineral rights duty; see sects. 20.-24.

(*l*) See above, p. 176.

(*m*) [C. 16 in Rutthead] s. 9; see *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(*n*) Litt. ss. 58, 72, 213, 214, 228, 229, 572; Sug. V. & P. 583; Dart, V. & P. 812, 5th ed.; 914,

Grantee's
right to
enforce
lessee's cove-
nants and
conditions.

c. 34, the grantee of such a reversion is enabled to sue upon such of the lessee's covenants contained in the lease as "touch or concern" the land demised (*o*), and also to take advantage of any condition of re-entry contained in the lease for non-payment of rent or breach of covenant (*p*). This statute, however, does not enable the grantee of the reversion to sue upon any covenant by the lessee which is collateral, and does not touch or concern the land demised (*q*), or to sue at law upon any agreement to be performed by a lessee and contained in a lease not made by deed (*r*). But in consequence of the doctrine introduced since the commencement of the Judicature Acts (*s*) that, where land is held under an agreement for a lease of which either landlord or tenant can enforce specific performance, the party so entitled is to be treated, in all Courts having jurisdiction to decree specific performance of the contract, as holding the land as landlord or tenant thereof *at law* upon the terms of the agreement (*t*), it has been decided that, where land is held for a term of years under a contract not made by deed but specifically enforceable by the landlord, and the landlord assigns the reversion with the benefit of the contract, the assignee is entitled to enforce all stipulations by the lessee contained in the contract and relating to the land demised as effectually as if such stipulations

6th ed.; 822, 7th ed.; Wms. Real Prop. 340, 21st ed.

(*o*) *Spencer's case*, 5 Rep. 16, 18; Sug. V. & P. 582, 583; 2 Dart, V. & P. 814, 5th ed.; 916, 6th ed.; 824, 7th ed.

(*p*) Co. Litt. 215; Wms. Real Prop. 338, 512, 513, 21st ed.

(*q*) 5 Rep. 18; Sug. V. & P. 583; and see *Webb v. Russell*, 3 T. R. 393; *Dewar v. Goodman*, 1909, A. C. 72; *Ricketts v. Enfield Churchwardens*, 1909, 1 Ch. 544.

(*r*) *Standen v. Christmas*, 10 Q. B. 135; *Bickford v. Parson*, 5 C. B. 920.

(*s*) Stats. 36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

(*t*) *Walsh v. Lonsdale*, 21 Ch. D. 9; *Furness v. Bond*, 4 Times L. R. 457; *Lowther v. Heaver*, 41 Ch. D. 248, 264; *Crumpp v. Temple*, 7 Times L. R. 120; *Foster v. Reeves*, 1892, 2 Q. B. 255; Wms. Real Prop. 503, 21st ed.

had been expressed in covenants contained in a lease by deed (*u*).

As regards leases made after the year 1881, the Conveyancing Act of 1881 (*x*) provides that the rent thereby reserved and the benefit of the lessees' covenants therein contained and having reference to the subject-matter thereof, and every condition of re-entry and other conditions therein contained shall be annexed to the reversionary estate in the land, immediately expectant on the term thereby granted (notwithstanding severance of that reversionary estate), and shall be capable of being recovered and enforced by the person from time to time entitled, subject to the term, to the income of the whole or any part of the land leased. The chief effect of the first part of this enactment is to enable the person seised of the legal estate in reversion in land leased under some statutory power to sue upon the lessee's covenants or a condition of re-entry contained in the lease. Thus where land is leased by a mortgagor under the power of leasing given by the Conveyancing Act of 1881 (*y*), the mortgagee is enabled to sue on the lessee's covenants and conditions contained in the lease (*z*). So where a lease is granted by a legal or an equitable tenant for life under the Settled Land Act, 1882 (*a*), the right to recover the rent and sue on the lessee's covenants and conditions is annexed to the legal estate in reversion on the term granted. And the enactment quoted applies equally to leases made in exercise of the right of alienation incident to the lessor's estate (*b*), and to those granted under express

Rights given by the Conveyancing Act of 1881 to enforce lessees' covenants and conditions.

In leases granted under statutory powers.

In other leases.

(*u*) *Manchester Brewery Co. v. Coombs*, 1901, 2 Ch. 608; *Rickett v. Green*, 1910, 1 K. B. 253.

(*x*) Stat. 44 & 45 Vict. c. 41, s. 10.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 18.

(*z*) *Municipal, &c. Building Society v. Smith*, 22 Q. B. D. 70.

(*a*) Stat. 45 & 46 Vict. c. 38, ss. 6—12, 20; see Wms. Real Prop. 121—123, 125, 189, 403, 404, 21st ed.

(*b*) *Rickett v. Green*, 1910, 1 K. B. 253; see Wms. Real Prop. 74, 108, 118, 218, 513, 21st ed.

Remedy given to the person entitled to the income of the land leased.

powers of leasing conferred by means of the Statute of Uses (c) or by will: though as to these it hardly seems to have extended the previous law (d). But the last part of this enactment invests the person for the time being entitled to the income of the land leased (in that capacity) with a new and independent remedy; and it has been held that it enables a mortgagor in possession (who has received no notice from the mortgagee of intention to enter into receipt of the rents) to sue upon the lessee's covenants contained in a lease made by him before the mortgage (e). The same construction has been placed on this enactment with respect to agreements for leases (f) as has been applied to the statute of Henry VIII. (g).

Assignee of reversion cannot sue for rent due or breach of covenant committed before his time.

The assignee of the reversion on a lease cannot sue the lessee for any rent due (h) or for any breach of covenant committed previously to the assignment (i). And he is not entitled to exercise any right of re-entry given by the lease in respect of any breach of covenant committed previously to the assignment (k); nor can

(c) Stat. 27 Hen. VIII. c. 10; see Wms. Real Prop. 392, 554, 21st ed.

(d) See *Whitlock's case*, 8 Rep. 69b, 71a; *Isherwood v. Oldknow*, 3 M. & S. 382; *Greenaway v. Hart*, 14 C. B. 340; *Yellowly v. Gower*, 11 Ex. 274; Davidson, Prec. Conv. vol. iii. pp. 484 and n. (x), 491—500, 3rd ed.; vol. ii. pt. ii. p. 336, n., 4th ed.; Sug. Pow. 722, 813—815, 8th ed.; Williams on Settlements, 36—39, 311—313.

(e) *Turner v. Walsh*, 1909, 2 K. B. 484.

(f) *Rickett v. Green*, 1910, 1 K. B. 253.

(g) Above, pp. 402, note (t), 403, note (u).

(h) *Flight v. Bentley*, 7 Sim. 149, 151.

(i) *Johnson v. St. Peter's Churchwardens*, 4 A. & E. 520; *Martyn v. Williams*, 1 H. & N. 817;

cf. *Mascal's case*, 1 Leon. 62; *Brown v. Trumper*, 26 Beav. 11, 16. The statement to the contrary made in Sug. V. & P. 181 and adopted in 2 Dart, V. & P. 814, 5th ed. (916, 6th ed.; 824, 7th ed.) seems to be incorrect. The mere right to sue for damages for a past breach of covenant, other than a covenant to pay money, appears not to be assignable: see *Torkington v. Magee*, 1902, 2 K. B. 427, 434; *Dawson v. Great Northern and City Rail.*, 1905, 1 K. B. 260, 270, 271.

(k) *Fenn v. Smart*, 12 East, 444; *Hunt v. Bishop*, 8 Ex. 675, 680; *Hunt v. Remnant*, 9 Ex. 635, 640; *Crane v. Batten*, 2 Com. Law Rep. 1696; 23 L. T. (O. S.) 220; Williams on Seisin, 125; *Cohen v. Tannar*, 1900, 2 Q. B. 609; cf. *Bennett v. Herring*, 3 C. B. N. S. 370.

the right to re-enter for any such past breach of covenant be effectually assigned to him, as a right of entry for condition broken is not assignable in law (*l*). It does not appear that the law has been altered in any of these respects by the provisions of the Conveyancing Act quoted in the preceding paragraph (*m*).

Where land has been let for a term of years and the reversion of part only of the land is assigned over, the rent is apportionable at common law (*n*), and the assignee can sue on the lessee's covenants under the statute 32 Hen. VIII. c. 34, with respect to that part of the land of which the reversion has been assigned to him (*o*). But the assignee of the reversion of part of lands demised could not, under the statute of Henry VIII., take advantage of any condition of re-entry contained in the lease; for the condition was destroyed by the severance of the reversion and was no longer enforceable even by the original landlord as to that part of the reversion which he retained (*p*). By Lord St. Leonards' Act (*q*), where the reversion upon a lease is severed and the rent is legally apportioned (*r*), the assignee of each part of the reversion is allowed to take the benefit of a condition of re-entry for non-payment of rent in respect of the apportioned rent so belonging to him. And under the Conveyancing Act of 1881 (*s*), on severance of the reversion on a lease made after that year every condition of re-entry or other condition therein contained

Severance of reversion on a lease for years.

Its effect on conditions of re-entry.

(*l*) See cases cited in previous note; *Jenkins v. Jones*, 9 Q. B. D. 128, 131; below, Chap. XV.

(*m*) See *Cohen v. Tamar*, 1900, 2 Q. B. 609; *Morris v. Kennedy*, 1896, 2 Ir. R. 247.

(*n*) 2 Inst. 504. Rent can only be legally apportioned with the consent of the tenant to the apportionment, or by the verdict of a jury: *Bliss v. Collins*, 5 B. & A. 876; *Mayor of Swansea v. Thomas*, 10 Q. B. D.

48; 1 Davidson, Prec. Conv. 546, 4th ed.; 452, 5th ed.

(*o*) *Twyman v. Pickard*, 2 B. & A. 105; *Badeley v. Figures*, 4 E. & B. 71; *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48.

(*p*) *Winter's case*, Dyer, 308; Co. Litt. 215a.

(*q*) Stat. 22 & 23 Vict. c. 35, s. 3.

(*r*) See above, n. (*n*).

(*s*) Stat. 44 & 45 Vict. c. 41, s. 12; see also s. 10, above, p. 403.

(including, of course, any condition of re-entry for breach of covenant) is apportionable, and may be enforced by the assignee or other person entitled to each part of the reversionary estate. But the assignee of the reversion of part of the land demised by a lease made before the year 1882 cannot take advantage of a proviso for re-entry on breach of covenant: though the condition is apportionable if the reversion were severed by act in the law, or by the involuntary act of the reversioner, as where part of the land leased has been taken compulsorily under the Lands Clauses Act, 1845 (*t*). Where lands have been let to a tenant from year to year, and the reversion of part of the lands is assigned, a valid notice to quit can only be given by the persons for the time being entitled to the reversion of the whole of the demised premises, and the assignee of the reversion of part cannot give notice to determine the tenancy as to his part (*u*). It does not appear that in this respect the law has been altered by the Conveyancing Act of 1881 (*x*). As already mentioned (*y*), when the reversion of part of lands leased for years is sold by auction, it is usual to stipulate that the purchaser shall be entitled to some specified portion of the rent, and shall not require the rent to be legally apportioned.

Notice to quit where the reversion has been severed.

Stipulation precluding legal apportionment of rent.

Reversions or remainders on an estate of freehold—

We have seen (*z*) that on the purchase under an open contract of a reversion or remainder expectant on an estate of freehold, the title must be carried back to the instrument creating the same, whatever be its date; and proof must be given that the possession of the land

(*t*) Stat. 8 & 9 Vict. c. 18; *Pigott v. Middlesex County Council*, 1909, 1 Ch. 134, 142, 143. The common law rule (above, p. 405, and n. (*p*)) is also subject to an exception in favour of the Crown; *Knight's case*, 5 Rep. 54; Co. Litt. 215a.

(*u*) *Prince v. Evans*, 29 L. T. N. S. 835; see also *Doe d. Prichitt*

v. Mitchell, 1 Brod. & Bing. 11; *Right d. Fisher v. Cuthell*, 5 East, 491, 498, per Grose, J.; *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135, 141.

(*x*) Stat. 44 & 45 Vict. c. 41, see ss. 10, 12.

(*y*) Above, p. 81.

(*z*) Above, pp. 97, 101, 102.

has been in accordance with that instrument. The main difficulty in establishing the title to such interests arises from the fact that, as the tenant of the particular estate is entitled to the custody of the title deeds, no proof can be given, beyond the vendor's affirmation, that the reversion or remainder sold has not been previously disposed of by way of sale or mortgage (*a*). Purchasers and mortgagees of reversions or remainders expectant on estates for life or other interests conferring the power of sale and other powers given by the Settled Land Acts, 1882 to 1890 (*b*), take subject to the subsequent exercise of such powers by the particular tenant, and their estates are liable to be divested accordingly, and in the case of sale to be transferred to the purchase money (*c*). Purchasers and mortgagees of such estates also take subject to the liability to pay any succession or estate duty which shall be charged thereon when the same shall fall into possession (*d*); and in the case of a sale the purchaser cannot (unless he specially stipulate therefor) require the vendor to procure such duty to be commuted or to discharge it when it falls due; for the tax is regarded as an incident of the estate and not as an incumbrance (*e*). But where such estates have been

Are subject to exercise of powers given by Settled Land Acts—

and to succession and estate duty.

(*a*) Wms. Real Prop. 463, 13th ed.; 599, 21st ed. The purchaser can of course inquire of the person entitled to the custody of the title deeds whether he is aware of any sale of the reversion, and whether the deeds have been produced at the request of the reversioner with a view to any sale or mortgage by him; but the person interrogated is not bound to answer, and an answer in the negative is no certain protection, as the reversion may have been disposed of by way of sale or mortgage without the knowledge of the particular tenant, and without production of the title deeds.

(*b*) Stats. 45 & 46 Vict. c. 38;

47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69.

(*c*) *Wheelwright v. Walker*, 23 Ch. D. 752; *Re Dickinson and Kellsall's Contract*, 1908, 1 Ch. 213; *Re Davies and Kent's Contract*, 1910, 2 Ch. 35; see above, pp. 318—322.

(*d*) Stats. 16 & 17 Vict. c. 51, ss. 2, 20, 42; 57 & 58 Vict. c. 30, ss. 1, 2, 9; see the chapter on the Death Duties in vol. ii.

(*e*) *Cooper v. Trewby*, 28 Beav. 194; *Re Kidd and Gibbons' Contract*, 1893, 1 Ch. 695, 698; *Re Repington*, 1904, 1 Ch. 811, 814; see also *Re Langham*, 1890, W. N. 213; 60 L. J. Ch. 110.

Sales of
reversionary
interests at
an under-
value.

Time of
essence of
contract on
sale of
reversionary
property.

bonâ fide sold or mortgaged for full consideration in money or money's worth, before the 2nd of August, 1894 (the date of the commencement of the Finance Act, 1894), no other duty will be payable by the purchaser or mortgagee, when the estates fall into possession, than would have been payable if that Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee (*f*). Sales of reversionary interests were formerly liable to be set aside in equity on the ground of mere inadequacy of consideration (*g*). But this rule was abolished by statute as from the 1st of January, 1868, since when no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate is to be opened or set aside merely on the ground of under-value (*h*). On the purchase of reversionary property, time is of the essence of the contract (*i*), and as the wearing out of the interest of the particular tenant is considered equivalent to perception of the profits, interest is payable on the purchase money from the date of the contract, if no time be specified for completion (*k*);

(*f*) Stat. 57 & 58 Vict. c. 30, s. 21 (3). By stat. 7 Edw. VII. c. 13, s. 12 (which increased the scale of rates of estate duty), where such estates have been sold or mortgaged as above mentioned before the 19th April, 1907, no other duty will be payable by the purchaser or mortgagee, when the estates fall into possession, than would have been payable if that section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee. Stat. 10 Edw. VII. c. 8 (which further increased the scale of rates of estate duty) contains a similar provision (sect. 64) as to sales and mortgages

made as above mentioned of such estates before the 30th April, 1909.

(*g*) See 2 Dart, V. & P. 750 sq. 5th ed.; 844 sq. 6th ed.; 749 sq. 7th ed.

(*h*) Stat. 31 & 32 Vict. c. 4; see below, Chap. XIV. § 2, as to the construction of this Act.

(*i*) Above, pp. 58, 59; *Newman v. Rogers*, 4 Bro. C. C. 391; Sug. V. & P. 262; 1 Dart, V. & P. 419, 5th ed.; 484, 6th ed.; 497, 7th ed.; below, Chap. XII. § 1.

(*k*) *Ex parte Manning*, 2 P. W. 410; *Child v. Abingdon*, 1 Ves. jun. 94; *Champernowne v. Brooke*, 3 Cl. & Fin. 4, 23; *Brooke v. Champernowne*, 4 Cl. & Fin. 589; *Enraght v. Fitzgerald*, 2 Dr. &

or if a time be fixed for completion, then from that time (*l*).

Where land sold consists of an allotment acquired under an Inclosure Act (*m*), the title material to be investigated, prior to the award made pursuant to the Act, is that under which all the lands, in respect of which the allotment was awarded, were held (*n*). It is also material to ascertain that the powers given by the Act were not exceeded in making the award, for no title is conferred by the award of any allotment made *ultra vires* (*o*).

Allotments
under an
Inclosure Act.

Where the title to land sold is made under an exchange effected in the manner which has now long been usual,—namely, by deeds of mutual conveyance containing vendor's covenants for title, but no provision for mutual re-entry in case of eviction (*p*),—the title to

Exchange
effected by
mutual
conveyances.

War. 43, 47; *Vesey v. Elwood*, 3 Dr. & War. 74, 82; *Wallis v. Sarel*, 5 De G. & S. 429.

(*l*) *Bailey v. Collett*, 18 Beav. 179; Sug. V. & P. 628; 1 Dart, V. & P. 630, 631, 5th ed.; 712, 6th ed.; 654, 7th ed.

(*m*) As to the inclosure of common fields and commons, see Wms. Real Prop. 62, 424, 21st ed.; Williams on Commons, 77—79, 246 sq.

(*n*) *Major v. Ward*, 5 Hare, 598, 604; Sug. V. & P. 372, 373; 1 Dart, V. & P. 164, 286, 5th ed.; 186, 326, 6th ed.; 181, 322, 7th ed.; 1 Davidson, Prec. Conv. 527, 4th ed. Inclosure Acts usually provided that the tenure of the lands allotted should be the same as that of the lands in respect of which the allotment was made, and reserved the minerals under the lands allotted to the persons previously entitled to them: but where no such provisions were made the tenure of the allotments was freehold and the mines under them passed with the soil to the

allottees; see Davidson, Prec. Conv. vol. ii. part i. p. 491, n., 4th ed.; *Townley v. Gibson*, 2 T. R. 701; *Doe d. Lowes v. Davidson*, 2 M. & S. 175; *Doe v. Hellard*, 9 B. & C. 789; *Wakefield v. Buccleugh*, L. R. 4 Eq. 613, 627; 4 H. L. 377; *Butterknowle Colliery Co., Ltd. v. Bishop Auckland, &c. Co., Ltd.*, 1906, A. C. 305; Williams on Commons, 223, 224, 250, 251; Inclosure Act, 1845 (stat. 8 & 9 Vict. c. 118), ss. 94, 98. As to the question whether the right of sporting over allotments of waste land has been reserved by an Inclosure Act to the lord of the manor, see Williams on Commons, 240—243; *Devonshire v. O'Connor*, 24 Q. B. D. 468; *Eccroyd v. Coulthard*, 1898, 2 Ch. 358.

(*o*) *Wingfield v. Tharp*, 10 B. & C. 785; *Casamajor v. Strobe*, 2 My. & K. 706, 718—722; Sug. V. & P. 375.

(*p*) See Davidson, Prec. Conv. vol. v. pt. ii. pp. 77—81, 3rd ed.; 1 Key & Elph. Prec. Conv. 700—713, 4th ed.

Exchange by
order under
the Inclosure
Act, 1845.

be investigated prior to the exchange (*q*) is the previous title to the land *taken* in exchange alone, and the title to the land *given* in exchange is immaterial (*r*). But where land sold has been acquired through an exchange effected by an order of exchange made under the Inclosure Act, 1845, and the Acts amending it (*s*), it is unnecessary for the purchaser to investigate the title to the land so acquired prior to the order of exchange (*t*); for unless the order were made without jurisdiction, that land thenceforward became irrevocably subject to the title, under which the land given in exchange was held (*u*). The prior title to the land *given* in exchange is, therefore, the only title which it is material to investigate (*x*); but as it appears that the order of exchange would be invalid if made without jurisdiction, and such jurisdiction arises on the application of the persons interested in the land pro-

(*q*) If the exchange were made at least forty years before the sale, it would of course be a good root of title; see above, pp. 100, 106.

(*r*) The acquisition of land in this way is exactly similar to its acquisition on sale, and if the title to the land given in exchange were bad, the party who took it in exchange would, in the absence of fraudulent misrepresentation, have no right to recover possession of the land which he exchanged for it, but could only pursue his remedy in damages under the covenants for title; *Bartram v. Whicheote*, 6 Sim. 86, 92; see below, Chap. XII. § 3; Chap. XIV. § 1; Chap. XIX. § 5. But where an exchange of lands was effected *at common law* before the year 1845, a mutual right of re-entry on eviction was implied, and so the title both to the land given and to the land taken in exchange was material; see *Bustard's case*, 4 Rep. 121 a; Sug. V. & P. 372; 1 Davidson,

Prec. Conv. 528, 4th ed.; Wms. Real Prop. 160, and n. (*e*), 217, 610, 611, 21st ed.; stats. 7 & 8 Vict. c. 76, s. 6; 8 & 9 Vict. c. 104, s. 4.

(*s*) See above, pp. 147 and n. (*q*), 152 and n. (*r*); Wms. Real Prop. 143, 217, 21st ed.

(*t*) 1 Davidson, Prec. Conv. 529, 4th ed.; 1 Dart, V. & P. 287, 5th ed.; 328, 6th ed.; 324, 7th ed.

(*u*) Stat. 8 & 9 Vict. c. 118, s. 147; *Minet v. Leman*, 20 Beav. 269, 279, 7 De G. M. & G. 340 (deciding that gavelkind land may well be so exchanged for land held in free and common socage); Collins, J., *Jacomb v. Turner*, 1892, 1 Q. B. 47, 51, 52; Davidson, Prec. Conv. vol. ii. pt. i. pp. 94, 95, n., 100, n., 4th ed.

(*x*) Such an order of exchange is not in itself a good root of title, as it affords no evidence of the validity of the title to the land given in exchange; see previous note; above, p. 106.

posed to be exchanged (*y*), it seems that the purchaser would be entitled to require proof that the person who applied for the order in respect of the land taken in exchange was in fact interested therein within the meaning of the Acts (*z*).

A sale as well as a conveyance of land includes the right to all mines and minerals in and under the land (*a*); except only gold and silver mines, which belong to the Crown (*b*). If, therefore, the vendor desire to reserve any minerals or have no title to the mines, he must be careful to provide by express stipulation that the minerals he desires to retain shall be excepted from the sale and sufficient working powers reserved to him, or that he is selling the surface only (*a*). Whenever mines and minerals are excepted from a conveyance of land by the agreement of the parties thereto, it appears that the word *minerals*, unless limited by the

Mines and minerals.

Royal mines.

What is included in the term *minerals*.

(*y*) *Jacomb v. Turner*, 1892, 1 Q. B. 47, 52.

(*z*) See stat. 8 & 9 Vict. c. 118, ss. 16 *sq.*, 147; above, p. 409, note (*p*); Davidson, *Prec. Conv.* vol. ii. pt. i. pp. 95, n., 100, n., 4th ed. So also after exchanges made under most local Inclosure Acts, upon inclosure under the Inclosure Act, 1845 (see *Jacomb v. Turner*, 1892, 1 Q. B. 47, 50), of lands lying in common fields, under stat. 4 & 5 Will. IV. c. 30, or under the Acts authorising the exchange of ecclesiastical property (stats. 55 Geo. III. c. 147; 56 Geo. III. c. 52; 1 Geo. IV. c. 6; 6 Geo. IV. c. 8), the title, prior to the exchange, of the land taken in exchange is not material, and it is only necessary to ascertain that the jurisdiction or right to make the exchange duly arose; see *Sug. V. & P.* 373; 1 *Dart, V. & P.* 287, 5th ed.; 327, 6th ed.; 323, 7th ed.; 1 *Davidson, Prec. Conv.* 529, 4th ed. Where land was taken

in exchange from a charity under stat. 1 & 2 Geo. IV. c. 92, repealed by 36 & 37 Vict. c. 91, the title to the land given and to that taken in exchange was material; 1 *Dart, V. & P.* 288, 5th ed.; 328, 6th ed.; 325, 7th ed.; 1 *Davidson, Prec. Conv.* 530, 4th ed. But where an exchange of charity land has been effected under the Charitable Trusts Act, 1853 (stat. 16 & 17 Vict. c. 137), ss. 24, 26, the transaction stands on the same footing as an exchange by deed of mutual conveyance; see above, p. 409; below, § 7 of this chapter: 1 *Dart, V. & P.* 329, 6th ed.; 325, 7th ed.

(*a*) See *Bellamy v. Debenham*, 1891, 1 Ch. 412; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; above, p. 167.

(*b*) *The case of Mines*, *Plowd.* 310, 336, 337; 1 *Black. Com.* 295; *A.-G. v. Morgan*, 1891, 1 Ch. 432.

context, will include every substance embedded in or forming part of the land and having a value of its own apart from its worth as a portion of the soil (*c*). Thus the term minerals, when used in such a conveyance (*d*), has been held to include china clay (*e*), coprolites (*f*), and brick earth and clay (*g*), and would certainly comprise slate, freestone and limestone (*h*), and every other kind of stone (*i*), besides coal and ironstone (*k*). It appears that the term *minerals* would have the same meaning in a contract of sale as in a conveyance of land (*l*). A landowner who has sold and conveyed away the surface excepting the mines and minerals, but without reserving any express power to enter and get them, retains by implication of law all necessary powers

Working powers implied on an exception of mines and minerals.

(*c*) *Romilly, M. R., Midland Ry. Co. v. Checkley*, L. R. 4 Eq. 19, 25; *Hext v. Gill*, L. R. 7 Ch. 699, 712, 719; *Kay, J., Midland Ry. Co. v. Haunchwood, &c. Co.*, 20 Ch. D. 552, 555; *Jersey v. Neath Poor Law Union*, 22 Q. B. D. 555, 559, 561, 563; *Johnstone v. Crompton*, 1899, 2 Ch. 190; *Great Western Rail. Co. v. Blades*, 1901, 2 Ch. 624, 631, 636, 638; *Re Todd, Birleston & Co. and North Eastern Ry.*, 1903, 1 K. B. 603, 606, 607; *Great Western Ry. v. Carpalla, &c. Co., Ltd.*, 1909, 1 Ch. 218, 226, 229, 231, 237; affirmed, 1910, A.C. 83.

(*d*) As to the meaning of the term *minerals* in the Railways Clauses Act, 1845 (stat. 8 & 9 Vict. c. 20), s. 77, and the Waterworks Clauses Act, 1847 (stat. 10 & 11 Vict. c. 17), s. 18, which except from conveyances of any land acquired subject to the provisions of those Acts "all mines of coal, ironstone or other minerals" under such land, unless expressly named and conveyed; see *Lord Provost, &c. of Glasgow v. Fairie*, 13 App. Cas. 657; *Midland Ry. Co. v. Robinson*, 15 App. Cas. 19; *Great Western Ry. v. Blades*, 1901, 2 Ch. 624; *Re*

Todd, Birleston & Co. and North Eastern Ry., 1903, 1 K. B. 603; *Great Western Ry. v. Carpalla, &c. Co., Ltd.*, 1909, 1 Ch. 218; 1910, A. C. 83, 85; from which it appears that in such cases the actual surface soil of the lands conveyed is not excepted, though it may have a value independently of its worth as mere soil.

(*e*) *Hext v. Gill*; *Great Western Ry. v. Carpalla, &c. Co., Ltd.*, *ubi sup.*

(*f*) *A.-G. v. Tomline*, 5 Ch. D. 750, 762.

(*g*) *Jersey v. Neath Poor Law Union*, *ubi sup.*

(*h*) *Bell v. Wilson*, L. R. 1 Ch. 303; *Watson, L. A., Lord Provost, &c. of Glasgow v. Fairie*, 13 App. Cas. 657, 679.

(*i*) *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. 19, 25.

(*k*) *Moulton, L. J., Great Western Ry. v. Carpalla, &c. Co., Ltd.*, 1909, 1 Ch. 218, 231; and see *Midland Ry. Co. v. Robinson*, 15 App. Cas. 19, 26, 33.

(*l*) See cases cited, above, note (*c*); *Newton, Chambers & Co., Ltd. v. Hall*, 1907, 2 K. B. 446, 452.

for working the same: but the powers so reserved to him are only such as are strictly necessary for the purpose (*m*); and it is usual on such sales for the vendor to stipulate expressly for the reservation of larger powers, including the liberty of using the surface for works connected with the mines, such as the deposit of rubbish, the erection of engines and other works, or of cottages for workpeople, and the making of tramways, railways, &c. (*n*). If a contract of sale of land should provide for the mines and minerals being excepted, but not for the reservation of any express powers of working them, the vendor would not be entitled to require the reservation to him, in the conveyance to the purchaser, of any larger powers than he would retain by implication of law; and if the contract should expressly provide for certain powers of working, the vendor could not require any larger powers to be reserved to him by the conveyance (*o*). In the absence of express or implied stipulation to that effect, a vendor retaining the mines and minerals will have no right to let down the surface by his workings (*p*), or, where the excepted minerals can only be gotten by surface work-

No larger powers can be reserved than were stipulated for in the contract.

Surface cannot be let down or destroyed without special power to do so.

(*m*) *Cardigan v. Armitage*, 2 B. & C. 197, 207, 208, 211; affirmed in D. P., Sugd. Law of Property, 88—91.

(*n*) *Williams on Commons*, 221; see *Davidson, Prec. Conv.* vol. ii. pt. i. 484 sq. and note; 1 *Key & Elph. Prec. Conv.* 310, 311, 4th ed.; 314, 315, 8th ed.

(*o*) The rule is that the rights to be defined in the conveyance are those conferred by the contract; see *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; below, Chap. XII. § 3.

(*p*) *Humphries v. Brogden*, 12 Q. B. 739; *Rowbotham v. Wilson*, 8 H. L. C. 348, 360; *Davis v. Trecharne*, 6 App. Cas. 460; *Dixon*

v. White, 8 App. Cas. 833, 842, 843; *Love v. Bell*, 9 App. Cas. 286; *Greenwell v. Low Beechburn Coal Co.*, 1897, 2 Q. B. 165; *New Sharlston Collieries Co., Ltd. v. Westmorland*, 1904, 2 Ch. 443, n.; *Butterknowle Colliery Co., Ltd. v. Bishop Auckland, &c. Co., Ltd.*, 1906, A. C. 305; *Markham v. Paget*, 1908, 1 Ch. 697, 710. As to what provisions will confer the right to let down the surface, see *Rowbotham v. Wilson*, *supra*; *Smith v. Darby*, L. R. 7 Q. B. 716; *Aspden v. Seddon*, L. R. 10 Ch. 394; *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.*, 1909, 1 Ch. 37; affirmed, 1910, A. C. 381; *Brewer v. Rhymney Iron Co.*, 1910, 1 Ch. 766, 770.

Mines and minerals go along with the surface until severed.

Mines once severed remain distinct from the surface.

ings, to work them in such a way as will utterly destroy the surface soil of the land (*q*). So long as the ownership of any mines or minerals is enjoyed as an incident of the ownership of the surface, they pass, as a rule, without express mention (unless specially excepted) upon any conveyance or disposition of the surface (*r*); and where a title has been acquired under the Statute of Limitations (*s*) by adverse possession of the surface, a similar title to the mines and minerals thereunder will have been equally obtained (*t*). But after mines have once been severed from the surface, they remain distinct therefrom as separate corporeal hereditaments (*u*), the title thereto is no longer affected by any act of disposition or possession of the surface; and it is not lost by any mere omission to enter upon or work the mines (*x*). In such case the

(*q*) *Bell v. Wilson*, L. R. 1 Ch. 303; *Heat v. Gill*, L. R. 7 Ch. 699, 713 *sq.*

(*r*) 2 Black. Comm. 18; *Newton, Chambers & Co., Ltd. v. Hall*, 1907, 2 K. B. 446, 452; above, p. 411. Exceptions occur (1) upon conveyances of lands acquired subject to the provisions of the Railways Clauses Act, 1845, or the Waterworks Clauses Act, 1847 (above, p. 412, n. (*d*)); (2) upon the enfranchisement of copyholds when effected by virtue of the powers given by the Copyhold Acts, 1841, 1852, 1858, or 1894 (see stats. 4 & 5 Vict. c. 35, ss. 13, 56 *sq.*, 82; 15 & 16 Vict. c. 51, s. 48; 21 & 22 Vict. c. 94, s. 14; 57 & 58 Vict. c. 46, s. 23); (3) upon the sale for redeeming land tax of lands of ecclesiastical corporations under the Land Tax Redemption Acts (see 1 Dart, V. & P. 370, 5th ed.; 422, 6th ed.; 425, 7th ed.); and (4) where streets or roads vest by statute in some local authority for the purposes only of exercising the powers thereby conferred on them in respect of the surface (see below, pp. 417, 418).

(*s*) 3 & 4 Will. IV. c. 27, amended by 37 & 38 Vict. c. 57.

(*t*) *Thev v. Wingate*, 10 B. & S. 714, n.; *Seddon v. Smith*, 36 L. T. N. S. 168; *Williams on Commons*, 152–154.

(*u*) The owner of the mines or *strata* so severed is therefore entitled to use the spaces left when the minerals have been worked out for any purpose he may please, such as the carriage of minerals gotten from under adjoining lands; *Proud v. Bates*, 11 Jur. N. S. 441; *Batten Pool v. Kennedy*, 1907, 1 Ch. 256. It should be noted that the reservation, upon a conveyance of land, of the mere right to get the coal or other minerals thereunder, is an entirely different thing from an exception of the mines and only confers on the grantee a *profit à prendre*, which is an incorporeal hereditament; *Sutherland v. Heathcote*, 1892, 1 Ch. 475; and see *Williams on Commons*, 219.

(*x*) *Seaman v. Fawdrey*, 16 Ves. 390, 392; *Norway v. Rowe*, 19 Ves. 144, 156; *Cardigan v. Armistage*, 2 B. & C. 197; *McDonnell*

acquisition, subsequent to the severance, of a new title to the surface under the Statute of Limitations, will not of itself disturb the title to the mines (*y*). If, however, the mines severed be actually entered upon and held by a trespasser in such a way that he keeps possession of them, he will in due time obtain a good title under the statute (*z*). It is not sufficient, however, for a trespasser merely to enter on a mine and take coal or other minerals away; he cannot get a title to a mine, as a corporeal hereditament, unless he remain in possession of it, as such, for the statutory period (*a*). And the retention of possession of some particular mine or seam of coal, or some part thereof, will not confer a title under the Statute of Limitations to any other mine or seam lying beneath the mine so possessed or to any other part of that mine than so much thereof as has been in the trespasser's actual possession (*b*). The reader will remember that, in the absence of any custom to the contrary, all mines and minerals in and under copyhold lands belong to the lord, though the tenant has possession of them, and neither party can work them without the other's consent (*c*). Such mines and minerals pass to the tenant upon an enfranchisement made by a con-

Title to severed mines by adverse possession.

Mines under copyholds.

v. McKinty, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Trustees, &c. Agency Co., Ltd. v. Short*, 13 App. Cas. 793, 799; *Williams on Commons*, 216—219; *Davidson, Prec. Conv.* vol. ii. pt. i. p. 489, n., 4th ed.

(*y*) See previous note; *McSwiney on Mines*, 584, 3rd ed.

(*z*) *Hall, V.-C., Ashton v. Stock*, 6 Ch. D. 719, 726; *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. 186; *Glyn v. Howell*, 1909, 1 Ch. 666, 675 sq. So also where minerals are embedded in the surface soil and gotten by surface workings, as gravel obtained by digging in gravel pits or stone by quarrying, a title under the Statute of Limitations may be acquired by keep-

ing possession of them, along with the surface, for the necessary period; *Smith v. Stocks*, 38 L. J. Q. B. 306.

(*a*) *Dartmouth v. Spittle*, 24 L. T. N. S. 67; *Ashton v. Stock*, *ubi sup.*; *Thompson v. Hickman*, 1907, 1 Ch. 550.

(*b*) *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. 186, 189; *Glyn v. Howell*, 1909, 1 Ch. 666.

(*c*) *Winchester v. Knight*, 1 P. W. 406; *Bouene v. Taylor*, 10 East, 189; *Lewis v. Branthwaite*, 2 B. & Ad. 437; *Keyes v. Powell*, 2 E. & B. 132; *Fawcett v. Granville*, 3 Ch. D. 826, 832, 833; 1 Seriv. Cop. 508 sq. 3rd ed.; *Wms. Real Prop.* 355, 13th ed.; 464, 21st ed. If the lord have by custom

veyance of the freehold in fee under the general law (*d*), unless of course they are expressly excepted: but they do not pass upon an enfranchisement (whether voluntary or compulsory) effected under the powers given by the Copyhold Acts, unless specially comprised therein (*e*).

Soil of roads.

At common law, it is presumed that the soil of all roads, whether highways or private ways, running through and enclosed on both sides by one man's land belongs to him (*f*); that a conveyance of the lands on both sides of the road includes the soil of the road (*g*); and that a conveyance by him of the land on one side of the road includes the soil of the nearest half, up to the middle of the road (*h*). Where such roads divide the lands of different owners, the presumption is that the owner of the land on each side of the road is entitled to the soil of that part of the road which adjoins his land up to the middle of the road; that any strips of waste land lying by the side of the road belong to the owner of the adjoining close (*i*); and that any con-

a right to enter and get the mines, he is not entitled to use the spaces left where the minerals have been worked out for any other purposes than such as are incidental to exercising this right, without the tenant's consent; *Eardley v. Granville*, 3 Ch. D. 826; cf. above, p. 414, n. (*x*).

(*d*) 1 Scriv. Cop. 25, 3rd ed.; above, p. 414; and see Davidson, *Prec. Conv.* vol. ii. pt. i. p. 386, n., 4th ed.

(*e*) See above, p. 414, n. (*r*).

(*f*) *Salisbury v. Great Northern Ry. Co.*, 5 C. B. N. S. 174; *Harrison v. Rutland*, 1893, 1 Q. B. 142; *Hickman v. Maisey*, 1900, 1 Q. B. 752.

(*g*) See *Salisbury v. Great Northern Ry. Co.*, ubi sup.

(*h*) See cases cited in note (*k*), p. 417, below.

(*i*) *Doe d. Pring v. Pearsey*, 7 B.

& C. 304; *Scoones v. Morrell*, 1 Beav. 251; *Holmes v. Bellingham*, 7 C. B. N. S. 329 (as to private roads). As to cases where a road adjoins an open common, see the first two cases cited in note (*m*), below. It should be noted that, where a high road, having unmetalled strips of land on either side of it, runs between fences, and there is nothing to show that the fences are not the boundaries of the highway, the presumption is that the public right of way extends over the whole of the land between the fences; *R. v. United Kingdom Telegraph Co.*, 6 L. T. N. S. 378; *Harvey v. Truro Rural Council*, 1903, 2 Ch. 638; *Offin v. Rochford Rural District Council*, 1906, 1 Ch. 342; cf. *Neeld v. Hendon Urban District Council*, 81 L. T. 406; *Belmore v. Kent County Council*, 1901, 1 Ch. 873.

veyance of the adjoining land carries with it the soil of one half of the road (*k*). And the same presumption arises in the case of a contract of sale of land as in that of a conveyance (*l*). These presumptions, however, may be rebutted by evidence that the ownership of the soil is not in the person or persons in whom, but for such evidence, it would be presumed to be (*m*), or that it was not the intention of the conveying parties to assure any part of the soil of the road (*n*). Whenever any conveyance is to be made of any land adjoining a road, the draftsman should take great care to make it unmistakably plain, whether any part of the soil of the road is intended to pass or not. Under the Public Health Act, 1875 (*o*), the surface soil of all streets, which are or become highways repairable by the inhabitants at large within any urban district, vests in the urban sanitary authority to the depth necessary for exercising the powers conferred by the Act: but the sub-soil, including all mines and minerals therein, remains vested in the person or persons entitled (save as provided by the Act) to the land, which is the site of the street (*p*). Under the

Streets within
an urban
district.

Mines and
minerals
thereunder.

(*k*) *Simpson v. Dendy*, 8 C. B. N. S. 433, affd. 7 Jur. N. S. 1058; *Herridge v. Wadd*, 10 C. B. N. S. 400 (where the land conveyed was described by reference to a plan not including any part of the road); *Re White's Charities*, 1898, 1 Ch. 659; and see *London & North Western Ry. Co. v. Westminster Corpn.*, 1902, 1 Ch. 269, 279, affirmed, 1905, A. C. 426, 428, 429, 438.

(*l*) *Re Poppel and Barratt's Contract*, 25 W. R. 248.

(*m*) *Grose v. West*, 7 Taunt. 39; *Doe v. Kemp*, 2 Bing. N. C. 102; *Beckett v. Leeds Corpn.*, L. R. 7 Ch. 421; *Haigh v. West*, 1893, 2 Q. B. 19, 20.

(*n*) *Salisbury v. Great Northern Ry. Co.*, 5 C. B. N. S. 174; *Plumstead Board of Works v. British Land Co.*, L. R. 10 Q. B. 16, 203,

206; *Leigh v. Jack*, 5 Ex. D. 264; *Pryor v. Petre*, 1894, 2 Ch. 11; *Mappin v. Liberty & Co., Ltd.*, 1903, 1 Ch. 118. The above presumptions have no application in the case where a railway runs through one man's land, or (as it appears) between the lands of different owners; *Thompson v. Hickman*, 1907, 1 Ch. 550, 556.

(*o*) Stat. 38 & 39 Vict. c. 55, s. 149. By s. 4, *street* includes any highway not being a turnpike road, and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not.

(*p*) *Coverdale v. Charlton*, 4 Q. B. D. 104, 121; *Tunbridge Wells Corpn. v. Baird*, 1896, A. C. 434; *Finchley Electric Light Co. v. Finchley Urban District Council*,

Streets in the metropolis.

Public conveniences under roads in London.

Main roads.

Metropolis Management Act, 1855 (*q*), the surface soil of all streets in the metropolis, which are highways, vests in the local authority to the same extent (*r*). Under the Public Health (London) Act, 1891 (*s*), however, the sub-soil of any road, exclusive of the footway adjoining any building or the curtilage of a building, is vested in the local sanitary authority for the purposes of making such public conveniences as are specified in sect. 44 of that Act. This enactment makes the sanitary authority the owner of such conveniences when made, but does not appear to confer any greater interest in the sub-soil than is necessary for the purposes specified (*t*). Under the Local Government Act, 1888 (*u*), all main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (*x*), vest in the County Council, except where the urban sanitary authority retain the powers and duties of maintaining and repairing such road (*y*). It has been held that this enactment does not make the County Council the owner of strips of waste land lying by the side of such roads, so as to entitle them to take the herbage thereof (*z*): but it appears to vest in them the surface soil of the metalled road and any footpath

1903, 1 Ch. 437; *Wednesbury Corpn. v. Lodge Holes Colliery Co., Ltd.*, 1905, 2 K. B. 823, 826; 1907, 1 K. B. 78, 89, 90; 1908, A. C. 323; *Foley's Charity Trustees v. Dudley Corpn.*, 1910, 1 K. B. 317, 322, 324, 325.

(*q*) Stat. 18 & 19 Vict. c. 120, s. 96. By s. 250, *street* is defined in the same way as in the Public Health Act, 1875; see note (*o*), p. 417, above.

(*r*) *Rolls v. St. George's Vestry, Southwark*, 14 Ch. D. 785; *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. D. 904; *Battersea Vestry v. County of London, &c. Lighting Co., Ltd.*, 1899, 1 Ch. 474.

(*s*) Stat. 54 & 55 Vict. c. 76.

(*t*) *London and North Western Ry. Co. v. Westminster Corpn.*, 1902, 1 Ch. 269, affirmed 1905, A. C. 426; *Westminster Corpn. v. Johnson*, 1904, 2 K. B. 737. See cases cited in note (*p*), above, p. 417.

(*u*) Stat. 51 & 52 Vict. c. 41, s. 11 (1, 6).

(*x*) Stat. 41 & 42 Vict. c. 77, s. 13.

(*y*) See *Finchley Electric Light Co. v. Finchley Urban District Council*, 1902, 1 Ch. 866, reversed 1903, 1 Ch. 437.

(*z*) *Curtis v. Kesteven County Council*, 45 Ch. D. 504.

lying by its side (*a*), so far as is necessary for the exercise of the powers vested in them (*b*).

The like presumptions are made with respect to the Soil of rivers. soil of rivers (where they are not tidal rivers) as with regard to the soil of roads (*c*). If the lands on both sides of the river belong to the same owner, it is presumed that he is the owner of the river-bed (*d*); that the whole of the river-bed passes on any conveyance or sale (*e*) of the lands on both sides of the river; and that one-half of the river-bed, up to mid-stream, passes by the conveyance or sale (*e*) of the land lying on one side of the river. And if the river divide the lands of different owners, it is presumed that each of them is the owner of that part of the river-bed which adjoins his own land, up to mid-stream, and that a conveyance or sale of the adjoining land carries with it the ownership of half the river-bed (*f*). These presumptions may equally be rebutted by evidence to the contrary, as in the case of roads (*g*). Where there is an ancient island in the middle of a river, and the lands on either bank of the river belong to different owners, the presumption that each riparian proprietor is the owner of half the river-bed applies only as far as the middle of the stream running between either bank and the island, and not so as to raise any presumption as to the ownership of the Island in a river.

(*a*) See *Derby County Council v. Matlock Bath, &c. Urban District*, 1896, A. C. 315.

(*b*) See cases cited in note (*p*), p. 417, above.

(*c*) Above, pp. 416, 417.

(*d*) As to what is the bed of a river, see *Thames Conservators v. Smeed*, 1897, 2 Q. B. 334. With respect to the legal results of a river changing its course, see *Carlisle Co. v. Graham*, L. R. 4 Ex. 361; *Foster v. Wright*, 4 C. P. D. 438; *Hindson v. Ashby*, 1896, 2 Ch. 1.

(*e*) *Re Popple and Barratt's Contract*, 25 W. R. 248.

(*f*) *Lord v. Sydney Commrs.*, 12 Moo. P. C. 473; *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133; *Kay, J., Fulbury v. Silva*, 15 Ch. D. 98, 108. These presumptions do not apply in the case of lands abutting on a canal, of which the surface soil belongs to other owners; *Chamber Colliery Co. v. Rochdale Canal Co.*, 73 L. T. 258.

(*g*) *Devonshire v. Pattinson*, 20 Q. B. D. 263; above, p. 417.

Owner of several fishery presumed to be owner of the soil.

Soil of tidal rivers.

Public right of navigation.
Seashore.

Foreshore.

island (*h*). It must not be forgotten that, where there has been a grant of a several fishery in any river, it is presumed, in the absence of evidence to the contrary, that the owner of the fishery is the owner of the soil of the river (*i*). In the case of tidal and navigable (*k*) rivers, estuaries and inland arms of the sea, the presumption is that the soil of the river-bed or sea-bed up to high-water mark belongs to the Crown (*l*); but such ownership is subject to the public right of navigation (*m*). The Crown is also presumably entitled to the soil of the seashore below high-water mark of ordinary tides, between the spring and the neap (*n*). But a subject may have become the owner of the soil of the foreshore—that is, the land lying between high and low-water mark of medium tides (*o*)—by grant from the Crown either conveying it in express terms (*p*), or presumed

(*h*) *Great Torrington Commons Conservators v. Moore Stevens*, 1903, 1 Ch. 347.

(*i*) See *Marshall v. Ulleswater Steam Navigation Co., Ltd.*, 3 B. & S. 732; *A.-G. v. Emerson*, 1891, A. C. 649; *Hindson v. Ashby*, 1896, 2 Ch. 1, 11, 20; *Eckroyd v. Coulthard*, 1897, 2 Ch. 554, 565, 570; *Hanbury v. Jenkins*, 1901, 2 Ch. 401, 411; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139, 146, 161.

(*k*) As to the meaning of navigable, see *Ilchester v. Raishleigh*, 61 L. T. 477.

(*l*) *Colchester Corpn. v. Brooke*, 7 Q. B. 339, 374; *Malcomson v. O'Dea*, 10 H. L. C. 593, 618; *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192, 207; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, 682; *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612, 621; *A.-G. v. Emerson*, 1891, A. C. 649, 653; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139, 146.

(*m*) See cases cited in previous note. Inland or non-tidal rivers may by immemorial user or by dedication be subject to a public right of navigation similar to a

public right of way along a road: see *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Bourke v. Davis*, 44 Ch. D. 110, 120—124; *Smith v. Andrews*, 1891, 2 Ch. 678, 689, n., 695—697; *Simpson v. A.-G.*, 1904, A. C. 476.

(*n*) *A.-G. v. Chambers*, 4 De G. M. & G. 206; *A.-G. v. Emerson*, 1891, A. C. 649, 653. Where the sea gradually encroaches or recedes, the soil, over which the Crown title extends, is altered accordingly; but a sudden irruption or dereliction of the sea does not cause any change of title to the soil so submerged or left dry: 2 Black. Comm. 262; *R. v. Yarborough*, 3 B. & C. 91, 2 Bligh, N. S. 147, 5 Bing. 163; *Re Hull and Selby Ry.*, 5 M. & W. 327; *Mercer v. Denne*, 1905, 2 Ch. 538, 579, 582, 584; *Wms. Real Prop.* 330, 13th ed. (426, 21st ed.).

(*o*) *Serattton v. Brown*, 4 B. & C. 485, 495; *Alderson, B., Re Hull and Selby Ry.*, 5 M. & W. 327, 332; *A.-G. v. Emerson*, 1891, A. C. 649, 653; *Mellor v. Walmsley*, 1905, 2 Ch. 164, 177—180.

(*p*) *Mace v. Philcox*, 15 C. B.

from the exercise of long-continued and uninterrupted acts of ownership to have included it (*q*), or to have been made (*r*). And the owner of a several fishery extending over the foreshore is presumed to be the owner of the soil thereof (*s*). A subject may also have derived from the Crown a title to the soil of the sea shore or of a tidal river below low-water mark: but in all such cases the owner holds subject to the right of public navigation (*t*). And if stone or shingle on part of the foreshore granted to a subject form a natural barrier against the incursion of the sea, he is not entitled to remove it (*u*). Where land conveyed is described as bounded by the seashore, that means by the inland limit of the foreshore, *i.e.*, high-water mark of medium tides; and there is no presumption that any part of the foreshore is included in the conveyance (*x*). The owner of land abutting on the seashore or situated on the bank of a tidal and navigable river, has the like right of access over the foreshore to and from the sea or river for the purpose of navigation and otherwise as is enjoyed by the owner of land on the bank of a non-tidal river (*y*). But the public have no general right to use the foreshore whether in the hands of the Crown or of a subject for bathing or other purposes (save such as may be incident to the proper exercise of the public rights of navigation and fishing), or to pass and repass

Several fishery over foreshore.

Land below low-water mark.

Foreshore, where a barrier against the sea.

Land bounded by the seashore.

Riparian owner's right of access to the sea.

No public right to walk on the foreshore.

N. S. 600; *Llandudno Urban District Council v. Woods*, 1899, 2 Ch. 705; *Liverpool, &c. Steamship Co. v. Mersey Trading Co., Ltd.*, 1909, 1 Ch. 209; and see *Scrutton v. Brown*, 4 B. & C. 485, 495 *sq.* (*q*) *Calmady v. Rowe*, 6 C. B. 861; *Beaufort v. Swansea*, 3 Ex. 413; *A.-G. of Ireland v. Vandeleur*, 1907, A. C. 369, 370; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139.

(*r*) *A.-G. v. Emerson*, 1891, A. C. 649, 653.

(*s*) *A.-G. v. Emerson, Fitzhardinge v. Purcell*, *ubi sup.*

(*t*) See cases cited in note (*t*) to p. 420, above; *The Swift*, 1901, P. 168, 173.

(*u*) *A.-G. v. Tomline*, 14 Ch. D. 58, followed *Musselburgh Real Estate Co., Ltd. v. Musselburgh (Provost)*, 1905, A. C. 491.

(*x*) *Mellor v. Walmsley*, 1905, 2 Ch. 164.

(*y*) *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *A.-G. of Straits Settlements v. Wemiss*, 13 App. Cas. 192; *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612; *Mellor v. Walmsley*, 1905, 2 Ch. 164, 181.

Inland lake. over it when not covered by the sea (z). The Crown is not entitled of common right to the soil of any inland lake, whether navigable or not; and it is a question whether the presumptions as to the soil of inland rivers (a) apply to inland lakes (b).

Water rights
in natural
rivers.

The owner of the land forming the bank of any natural river or stream has the right, as incident to such ownership and not as an easement (c), to have the water flow down in its natural state, neither increased nor diminished in quantity (save only so far as may be occasioned by the lawful uses of the owners higher up the stream) (d) and unpolluted (e). But the owner of any land higher up the stream may enjoy a prescriptive

(z) *Blundell v. Catterall*, 5 B. & A. 268; *Llundudno Urban District Council v. Woods*, 1899, 2 Ch. 705; *Brinckman v. Matley*, 1904, 2 Ch. 313; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139, 165 sq. The foreshore may be subject through immemorial user to the right of the owners of fishing boats and other craft to fix moorings in the soil; *A.-G. v. Wright*, 1897, 2 Q. B. 318. And there may be a good custom for fishermen to dry their nets on land near the sea; *Mercer v. Denne*, 1904, 2 Ch. 534; 1905, 2 Ch. 538.

(a) Above, p. 419.

(b) *Bristow v. Cormican*, 3 App. Cas. 641, 658, 665—667.

(c) *Shury v. Piggot*, 3 Bulst. 339.

(d) *Wright v. Howard*, 1 Sim. & St. 190, 203; *Mason v. Hill*, 5 B. & Ad. 1, 17 sq.; *Embrey v. Owen*, 6 Ex. 353; *Miner v. Gilmour*, 12 Moo. P. C. 131, 156; *Chasemore v. Richards*, 7 H. L. C. 349, 382; *Sarindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697, 704, 709; *Blackburn, L. A., Orr Ewing v. Colquhoun*, 2 App. Cas. 839, 854; *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155; *Roberts*

v. Gwyfai District Council, 1899, 2 Ch. 608; *Bradford Corpn. v. Ferrand*, 1902, 2 Ch. 655, 660; *McCartney v. Londonderry, &c. Ry. Co., Ltd.*, 1904, A. C. 301; *John White & Sons v. J. & M. White*, 1906, A. C. 72, 80. Any riparian owner may take water from the stream for his own domestic purposes, such as drinking, washing and watering his cattle, and for the reasonable irrigation of his land; and he is also entitled to divert the water from the stream for such purposes as the supply of water power to a mill erected on his land, provided always that he return the water so used to the stream and do not substantially interfere with the rights of the other riparian proprietors to the natural flow of the water: but he is not entitled to divert the water to a place outside his riparian tenement and consume it there for purposes unconnected with such tenement: see the cases above cited; *Kensil v. Great Eastern Ry. Co.*, 27 Ch. D. 122.

(e) *Wood v. Wand*, 3 Ex. 748; *John Young & Co. v. Bankier Distillery Co.*, 1893, A. C. 691, 697, 698, 701; and cases cited in previous note.

right in the nature of an easement to abstract from the stream a larger quantity of water than he is allowed as riparian owner to take for his own use (*f*), or to discharge extraneous water or other matter into the stream (*g*). But any prescriptive right to discharge such matter into a stream does not absolve its owner from the necessity of observing the requirements of the Rivers Pollution Prevention Act, 1876 (*h*). The right to the natural flow of water is confined to such water as flows in a known and defined stream or channel, and does not extend to surface water not so flowing (*i*), or to underground water merely percolating through the strata in no known channels (*k*). If, however, a stream of water flow underground in a defined and known channel and afterwards emerge on to the surface, the owners of land lower down the stream will be entitled to the natural flow of the water down to them (*l*).

Surface or underground water not flowing in a known and defined channel.

The right to the flow of water along an artificial watercourse depends on entirely different principles; it is not enjoyed of common right as incident to the ownership of the land through which the water flows, but is an easement arising by grant or prescription (*m*). Where an artificial watercourse is obviously made for a

Water rights in artificial watercourses.

(*f*) See *Wright v. Howard*, 1 S. & S. 190, 203; *Race v. Ward*, 2 F. & B. 702; Williams on Commons, 305, 331, 332.

(*g*) See *Crossley & Sons, Ltd. v. Lightowler*, L. R. 2 Ch. 178; *Rosendale v. McMurray*, ib. 790; *McIntyre Bros. v. McGowan*, 1893, A. C. 268; Williams on Commons, 336.

(*h*) Stat. 39 & 40 Viet. c. 75, ss. 2, 3, 4; see *Battensworth v. West Riding of Yorkshire Rivers Board*, 1909, A. C. 45, 48—50, 54, 55, 57.

(*i*) *Rastron v. Taylor*, 11 Ex. 369; *Bradford Corp. v. Ferrand*, 1902, 2 Ch. 655, 660.

(*k*) *Chasemore v. Richards*, 7 H. L. C. 349; *Bradford Corp. v. Pickles*, 1895, A. C. 587; *Bradford Corp. v. Ferrand*, 1902, 2 Ch. 655.

(*l*) See *Dickinson v. Grand Junction Canal*, 7 Ex. 282, 300, 301; *Chasemore v. Richards*, 7 H. L. C. 349, 374, 384; *Bradford Corp. v. Ferrand*, 1902, 2 Ch. 655, 665, in which case it was held that there is no right to the flow of water along an underground channel, which may be defined, but is not known.

(*m*) *Rameshwar Iershad Narain Singh v. Kany Behari Pattak*, 5 App. Cas. 121, 126—128; Williams on Commons, 305, 311, 338, 342.

particular and temporary purpose only, as for draining a mine or land or for supplying water power to a water mill, the owner of any land lower down the stream, as he takes the water with notice of such purpose, does not acquire by reason of such enjoyment, though long continued, any right to the continuance of the flow of water (*n*). But where the circumstances are such that it appears that the watercourse must have been constructed for the mutual benefit of the owners of the lands, through which it flows, a right to the continuance of the water supply may be acquired, as an easement, through long continued enjoyment (*o*). And in the case of an ancient artificial watercourse of which the exact origin is unknown, it will be presumed in such circumstances that it was constructed on the terms that the various riparian owners should enjoy the like rights to the flow of water, and also (it seems) in the bed of the stream, as they would have if the stream were natural (*p*). Of course an artificial watercourse flowing through the lands of more than one owner is in its inception a burden as well as a benefit to the landowner lower down the stream; that is to say, the landowner higher up can have no right to discharge the water on to the land lower down without acquiring an easement for that purpose (*q*). Where such a right exists for pure water, it appears that the landowner higher up can have no right to discharge into the watercourse extraneous matter which pollutes the water, unless he

(*n*) *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Wand*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Ex. 291; *Burrows v. Lang*, 1901, 2 Ch. 502.

(*o*) *Sutcliffe v. Booth*, 9 Jur. N. S. 1037; *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121, 128. Such an easement may be gained either by prescription at common law alleging immemorial user, or

through twenty years' enjoyment from which a lost grant can be presumed, or through twenty or forty years' enjoyment under the Prescription Act (stat. 2 & 3 Will. IV. c. 71), s. 2; see Williams on Commons, 305—310.

(*p*) *Baily v. Clark*, 1902, 1 Ch. 649; *Whitmores (Edenbridge), Ltd. v. Stanford*, 1909, 1 Ch. 427.

(*q*) See *Wright v. Williams*, 1 M. & W. 77.

has acquired an enlarged easement entitling him to do so (*r*). And if the circumstances be such that the landowner lower down has acquired the right to the continuance of the flow of water, he will have the like right to have the water come down to him unpolluted as if the stream were natural (*s*).

On the purchase of landed estates in the country it is of course a matter of great importance to ascertain that the title to the rights of fishing and sporting is clear. The right of fishing in all tidal waters, whether of the sea-coast or of any tidal river, estuary or inlet of the sea, is *primâ facie* public (*t*), the public being entitled to exercise this right by virtue of the Crown's ownership of the soil covered by such tidal waters, which ownership is subject to the public rights of navigation thereover and fishing therein (*u*). But the Crown had power, until deprived of it by Magna Carta (*x*), to grant to any individual subject a several fishery in such tidal waters, that is, the exclusive right of fishing therein; and there are many several fisheries existing by virtue of such grants in tidal waters at the present day (*y*). The right of fishing in non-tidal waters is an incident of the

Rights of fishing and sporting.

Rights of fishing in tidal waters.

Several fishery in tidal waters.

Rights of fishing in non-tidal waters.

(*r*) See *Goldsmid v. Tynbridge Wells Improvement Commissioners*, L. R. 1 Ch. 349; *Crossley & Sons, Ltd. v. Lightowler*, L. R. 2 Ch. 478; *Barendse v. McMurray*, *ib.* 790.

(*s*) See *Mayor v. Chadwick*, 11 A. & E. 571; Williams on Commons, 341, 342.

(*t*) *Ward v. Creswell*, Willes, 265; *Bagott v. Orr*, 2 Bos. & P. 472; *Blundell v. Catterall*, 5 B. & A. 268, 276, 294, 301, 304; *Malcomson v. O'Dea*, 10 H. L. C. 593, 618; *Carlisle Corpn. v. Graham*, L. R. 4 Ex. 361, 367, 368; *Brinkman v. Matley*, 1904, 2 Ch. 313, 315, 325, 327; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139, 165—167; Williams on Commons, 265, 266.

(*u*) Above, pp. 420, 421.

(*x*) Stat. 9 Hen. III. c. 16.

(*y*) *Somerset v. Fagwell*, 5 B. & C. 875, 884; *Malcomson v. O'Dea*, 10 H. L. C. 593, 618; *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192, 209; *Carlisle Corpn. v. Graham*, L. R. 4 Ex. 361; *Northumberland v. Houghton*, L. R. 5 Ex. 127; *Neill v. Devonshire*, 8 App. Cas. 135, 158, 177—180; *A.-G. v. Emerson*, 1891, A. C. 649; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139; Williams on Commons, 268. Several fisheries so granted are, however, subject to the public right of navigation; see cases cited above, p. 420, n. (*l*).

Rights of
fishing
severed from
the owner-
ship of the
soil.

Several
fishery.
Common of
piscary.

ownership of the soil covered by them (*z*). If this soil belong entirely to one owner, the right of fishing is *primâ facie* exclusively his; and where the soil belongs to more owners than one (as in the case of the opposite banks of a river and the adjoining halves of the river-bed belonging to different persons (*a*)), they have *primâ facie* the exclusive right of fishing between them, each being entitled (it appears) to fish the waters covering the soil, which he owns (*b*). The right of fishing in non-tidal waters may, however, have become vested by grant or prescription, either wholly or partially, in some other person than the owner of the soil covered by them. A right of fishing so acquired apart from the ownership of the soil is a *profit à prendre* (*c*), and may take the form either of a several fishery, which is the right of fishing to the exclusion of all others (*d*), or of common of piscary, which is the right to fish in common with others (*e*). We have seen that it is presumed that the owner of a several fishery is the owner of the soil covered by the waters over which his right of fishing extends (*f*): but there is no doubt that a several fishery may also exist as a separate incorporeal hereditament apart from the ownership of the soil (*g*). And it

(*z*) Hale de Jure Maris, Ch. 1, p. 1 (see Hargrave's Law Tracts); *The Banne*, Davis, 55, 56, 57; 2 Black. Comm. 39; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732, 745, 748; *Bristol v. Coomman*, 3 App. Cas. 641, 664; *Pearce v. Scotcher*, 9 Q. B. D. 162, 165, 167; *Bowen, L. J., Blount v. Layard*, 1891, 2 Ch. 681, n.; 689, n.; *Hindson v. Ashby*, 1896, 2 Ch. 1, 9, 10; *Eckroyd v. Coulthard*, 1897, 1 Ch. 554, 566; 1898, 2 Ch. 358, 366, 373.

(*a*) Above, p. 419.

(*b*) See authorities cited in note *a* above; *Williams on Commons*, 269; *Stuart Moore on Fisheries*, 113; *Hanbury v. Jenkins*, 1901,

2 Ch. 401, 405, 415, 419, 421; *Chesterfield v. Harris*, 1908, 2 Ch. 397.

(*c*) *Williams on Commons*, 18; *Fitzgerald v. Furbank*, 1897, 2 Ch. 96.

(*d*) *Malcomson v. O'Dea*, 10 H. L. C. 593, 618, 619; *Hanbury v. Jenkins*, 1901, 2 Ch. 401, 411.

(*e*) *Williams on Commons*, 259; *Stuart Moore on Fisheries*, 32 sq.; *Chesterfield v. Harris*, 1908, 2 Ch. 397, 412, 418—424, 426—429.

(*f*) Above, p. 420.

(*g*) *Somerset v. Fagwell*, 5 B. & C. 875; *Williams on Commons*, 264; *Hanbury v. Jenkins*, 1901, 2 Ch. 401. A claim to a several fishery in gross cannot be established under the Prescription

appears that, where there is a several fishery severed from the ownership of the soil, there may be appurtenant thereto a right of way along the banks of the river for the purpose of exercising the right of fishing (*h*). The public have no right of fishing in any non-tidal river, though navigable (*i*), and cannot acquire such right by user, for however long a period (*k*). The right of sporting over land, that is, the right of killing and taking away the game and other wild animals thereon, may be enjoyed either by virtue of some franchise derived from the Crown (such as a forest, a chase, a park, or a free warren), or as an incident of the ownership of the land (*l*), or as a separate incorporeal hereditament, in the nature of a *profit à prendre*, enjoyed through grant or prescription, independently of the ownership of the soil (*m*). It must not be forgotten that all rights of fishing and sporting, which are incident to the ownership of the soil of any land, are exerciseable by a lessee of the land for any term of lives or years or less in virtue of his occupation of the demised premises, unless these rights were expressly reserved to the lessor, his heirs and assigns upon the granting of the lease (*n*). A reservation of this kind

Right of
sporting.

Lessee's
rights of
fishing and
sporting.

Act (stat. 2 & 3 Will. IV. c. 71); *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; see Williams on Commons, 1, 4, 5, 9, 11, 265. As to the legal effect upon a several fishery of a river changing its course, see cases cited above, p. 419, n. *d*.

(*h*) *Hadbury v. Jenkins*, 1901, 2 Ch. 401.

(*i*) See above, p. 420, n. *m*.

(*k*) *Hudson v. Macrae*, 4 B. & S. 585; *Hargreaves v. Duddams*, L. R. 10 Q. B. 582; *Pearce v. Satchell*, 9 Q. B. D. 162; *Smith v. Andrews*, 1891, 2 Ch. 678.

(*l*) See *Case of Monopoles*, 11 Rep. 84b, 87b; Williams on Commons, 18, 82, 152, 228 sq., 240—243; *Deconshire v. O'Connor*, 24 Q. B. D. 468.

(*m*) See *Wickham v. Hawker*, 7 M. & W. 63; *Edwett v. Graham*, 7 H. L. C. 331, 334, 335; *Hooper v. Clark*, L. R. 2 Q. B. 200; *Webber v. Lee*, 9 Q. B. D. 315; *Lowe v. Adams*, 1901, 2 Ch. 598. As to the difference between a mere licence and the grant of a *profit à prendre*, see *Wood v. Leadbitter*, 13 M. & W. 838, 844, 845; *Halford v. Baden*, 13 Q. B. 426, 446; *Lowe v. Adams*, 1901, 2 Ch. 598, 601; and see *Grave v. Portal*, 1902, 1 Ch. 727.

(*n*) Except, however, as to game, in the case of leases made before the 5th Oct., 1831; see stat. 1 & 2 Will. IV. c. 32, ss. 6—8; *Calman v. Bathurst*, L. R. 6 Q. B. 366; *Pochin v. Smith*, 52 J. P. 1; *Jones v.*

in a lease is not an exception or a reservation in the strict legal sense of these words, but operates as a grant from the lessee of the *profit à prendre* specified (*o*); and such a grant, being of an incorporeal hereditament, is required at common law to be made by deed (*p*). It is therefore necessary that the lease should be by deed, and the lessee should execute it in order that the lessor may obtain the *legal* right to the privilege so purported to be reserved (*q*): though the lessor would enjoy the like right in *equity* without such execution (*r*). And it is requisite that the privilege should be expressed to be reserved to the lessor *and his heirs* or to him *in fee simple* in order that the *profit à prendre* so granted shall endure beyond the lessor's own life (*s*).

Waste land
of a manor.

In buying a manor or any waste land of a manor, it should be borne in mind that the lord of the manor is entitled to the soil of any waste land of the manor, including any mines or minerals thereunder, and is consequently entitled to the right of sporting thereover (*t*), but such ownership is subject to all rights of common thereover of the freehold and copyhold tenants of the

Darves, 86 L. T. 447; *Wms. Pers. Prop.* 21—27, 11th ed.: 47, 141—143, 16th ed.

(*o*) It is the general practice so to reserve the rights of sporting in granting leases of agricultural land: see *Davidson, Prec. Conv.*, vol. v., pt. i., pp. 87, 215, 227, 228, 243, 260, 3rd ed.; *Davidson's Concise Precedents*, 390, 398, 18th ed. Such reservations are subject to the provisions of the Ground Game Acts, 1880 and 1906, stats. 43 & 44 Vict. c. 47; 6 Edw. VII. c. 21; see *Wms. Pers. Prop.* 141, 16th ed.

(*p*) *Bird v. Higginson*, 2 A. & E. 696, 704, 6 A. & E. 824; *Brigstocke v. Rayner*, 40 J. P. 245.

(*q*) *Doe v. Lock*, 2 A. & E. 705, 710, 743; *Wickham v. Hawker*, 7 M. & W. 63, 76, 77; *Ewart v.*

Graham, 7 H. L. C. 331, 334, 335; *Proud v. Bates*, 11 Jur. N. S. 441; see however as to a reservation of the right to kill game, *R. v. Tharlstone*, 1 E. & E. 502.

(*r*) See *Love v. Adams*, 1901, 2 Ch. 598; *May v. Belleville*, 1905, 2 Ch. 605; *Laws of England*, x., 377, 401, §§ 678, 721 (by the writer).

(*s*) Litt. s. 1; Co. Litt. 9 a, b, 307 a; *Hewlins v. Shippam*, 5 B. & C. 221, 228, 229.

(*t*) *Bract. fo.* 227, 228; *Townley v. Gibson*, 2 T. R. 701; *Williams on Commons*, 103 sq., 150—152, 212, 213, 240—243; *Lancashire v. Hunt*, 10 Times L. R. 310; above, pp. 409, n. (*n*), 427, and n. (*l*).

manor (*u*). Since the 21st of September, 1893, the lord's right of approvement under the Statutes of Merton and Westminster the Second (*x*) of any part of a common is only exercisable with the consent of the Board of Agriculture (*y*). The lord of a manor has no right to enter upon any lands held by his freehold or copyhold tenants for the purpose of sporting there-over (*z*), or for any other purpose (*a*).

Approvement
of part of a
common.

Every landowner is entitled of common right, and as a natural incident of his ownership, to have his soil supported in its natural state by the soil of the adjacent lands (*b*). This right does not, however, entitle him to any additional support required for any buildings which he may erect on his land (*c*): but he may by grant, express or implied (*d*), or through long continued enjoyment become entitled to such further support. The right to further lateral support for any buildings or additional buildings erected on any land may be acquired by twenty years' open and uninterrupted enjoyment: but conflicting opinions have been given by the judges and in the House of Lords on the question whether this right is a positive easement involving an actual physical burden on the supporting soil, a negative easement merely restricting the use of that soil, or simply an enlargement of the right of lateral support arising from the ownership of the land supported (*e*). When land is sold with any buildings

Right of
lateral
support.

(*u*) See Williams on Commons, 2 *sq.*, 17, 24, 31 *sq.*, 103 *sq.*, 123, 150 *sq.*, 168 *sq.*, 170, 212 *sq.*

(*x*) Stats. 20 Hen. III. c. 4; 13 Edw. I. c. 46; see Williams on Commons, 103 *sq.*

(*y*) Stat. 56 & 57 Vict. c. 57, s. 2, passed 22nd Sept. 1893.

(*z*) *Pickering v. Noyes*, 4 B. & C. 639.

(*a*) See Wms. Real Prop. 7, 17, 27, 36, 38 and n. (*x*), 58, 64-66, 460-462, 464, 21st ed.

(*b*) See *Dalton v. Angus*, 6 App. Cas. 740; *New Mass. Collyer, Ltd. v. Manchester Corpn.*, 1908, A. C. 117; Gale on Easements, 216-335, 4th ed.

(*c*) *Wigatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; Gale on Easements, 218 (343, 4th ed.).

(*d*) See cases cited in note (*f*) below, p. 430.

(*e*) *Dalton v. Angus*, 6 App. Cas. 740.

Sale of land with buildings or for building purposes.

erected thereon or for the purpose of erecting any buildings or additional buildings thereon, the vendor impliedly agrees to confer upon the purchaser the right of support for such buildings by any adjoining lands, which the vendor retains, and the purchaser is entitled to such right of support accordingly (*f*).

Support of buildings by buildings on adjoining land.

It appears that the right of support of some building by another building erected on adjoining land and not belonging to the owner of the building so supported is an easement to be acquired by grant or prescription (*g*). The common user, for the purposes of support, of a wall separating the houses or buildings of two different owners is evidence *prima facie* that the wall and the land on which it is erected belongs to them as tenants in common in equal shares (*h*). But this presumption may be rebutted by evidence that the wall was actually built half on one owner's land and half on the other's at their joint expense, or entirely on one owner's land or otherwise; and in such case the ownership of the wall and the rights of support thereby will be according to the facts proved (*i*). The term "party wall" may be applied in any of such cases, but its primary meaning appears to be that of a dividing wall held in common (*k*). In the metropolis the rights of landowners, whose properties are divided by a party

Party walls.

(*f*) *North Eastern Ry. Co. v. Elliot*, 1 J. & H. 145, 153; affirmed, 2 De G. F. & J. 423; and nom. *Elliot v. North Eastern Ry. Co.*, 10 H. L. C. 333, 356, 362; *Siddons v. Short*, 2 C. P. D. 572; *Dalton v. Angus*, 6 App. Cas. 740, 792, 826; *Rigby v. Bennett*, 21 Ch. D. 559; *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836, 841, 842.

(*g*) *Lemaître v. Davis*, 19 Ch. D. 281; *Tone v. Preston*, 24 Ch. D. 739, 742; and see *Union Lighterage Co. v. London Graving Dock*

Co., 1902, 2 Ch. 557.

(*h*) *Cubitt v. Porter*, 8 B. & C. 257; and see *Watson v. Gray*, 14 Ch. D. 192; *Mayfair Property Co. v. Johnston*, 1894, 1 Ch. 508. At common law, either owner has the right to repair such a party wall; *Colebeck v. Girdlers' Co.*, 1 Q. B. D. 234, 243.

(*i*) *Matts v. Hawkins*, 5 Taunt. 20; and see *Watson v. Gray*, 14 Ch. D. 192, 195; *Jones v. Pritchard*, 1908, 1 Ch. 630; *Mason v. Fulham Corp.*, 1910, 1 K. B. 631, 637.

(*k*) See *Watson v. Gray*, *ubi sup.*

wall, are regulated by the London Building Act, 1894 (*l*).

Where the lands of two different owners are separated by a ditch and a bank or hedge, it is presumed, in the absence of evidence to the contrary, that the bank or hedge and also the soil of the ditch belong to the owner of the land on the side where the ditch is not: but no such presumption arises where there is a ditch on both sides of a hedge (*m*).

Boundary
hedges and
ditches.

If an undivided share in land be sold, which is held under a tenancy in common created less than forty years before the sale, the title to be shown, in the absence of special stipulation, is the title to the entirety from a date forty years at least before the contract down to the creation of the tenancy in common, and thenceforward the title to the share sold only (*n*). But where the share sold has been held as an undivided share for more than forty years, only forty years' title to the share, as such, can be required. Of course in either case the abstract must commence with a good root of title (*o*). If one tenant in common buy the share of another, and stipulate generally for the delivery of an abstract of title or stipulate expressly that a good title shall be shown, he is entitled to production of the same title as if he were a stranger (*p*). But if he make no

Undivided
share in land.

Tenant in
common
buying other
shares.

(*l*) Stat. 57 & 58 Vict. c. cxxiii.; see *Drury v. Army and Navy, &c. Supply*, 1896, 2 Q. B. 271; *Hobbs v. Gower*, 1899, 1 Ch. 11; *Re Stone and Hastie*, 1903, 2 K. B. 463; *Carlisle v. Salt*, 1906, 1 Ch. 335 (as to which see above, p. 177 and n. (*o*)); *Lewis v. Charing Cross, &c. Ry.*, *ib.* 509; *Crosby v. Alhambra Co., Ltd.*, 1907, 1 Ch. 295; *Mason v. Fulham Corpn.*, 1910, 1 K. B. 631.

(*m*) Bayley, J., *Guy v. West*, 2 Sel. N. P. 1244, 13th ed.;

Laurence, J., *Towles v. Mellor*, 3 Taunt. 137, 138; Holroyd, J., *Das v. Pearse*, 7 B. & C. 304, 307, 308; *Marshall v. Taylor*, 1895, 1 Ch. 641, 644, 647, 649; *Croft v. Padmore*, 18 Times L. R. 282; *Henniker v. Howard*, 90 L. T. 157.

(*n*) Sug. V. & P. 377.

o Above, pp. 94–100, 106–108, 192, 208–210.

p *Morris v. Keasling*, 2 Y. & C. 139; Sug. V. & P. 377, 428.

such stipulation, and the tenancy in common were created less than forty years before the sale, it appears that he can only demand production of the title to the share sold since the creation of the tenancy in common (*q*). The vendor of an undivided share in land must of course be careful to describe it as such and to state accurately the proportion to which he is entitled; as if he should purport to sell the entirety or a larger share than he has (*r*), the purchaser would be entitled at his option either to reject the title altogether (*s*), or to take what the vendor could convey and demand compensation for the deficiency (*t*).

Title under
trust for con-
version.

Whenever a vendor claims to have become entitled to some property as realty or personalty under a trust for conversion of money into land, or *vice versa* (*u*), the purchaser's advisers should be careful to ascertain that there is or has been an effective trust for conversion as alleged. And it must be borne in mind that, except in the two cases of a term of years attendant upon the inheritance (*x*) and capital money actually arising under the Settled Land Acts (*y*), personalty can only acquire in equity the character and incidents of realty by means of an imperative trust for investment in the purchase of real estate (*z*). Thus it has been held that a direction, that money shall be held and applied upon the same trusts and in the same manner as if it were capital money arising under the Settled Land Acts

(*q*) *Law v. Law*, 9 Jur. 745; *Phipps v. Child*, 3 Drew. 709; *Brooke v. Garrad*, 2 De G. & J. 62, 68; *Dart, V. & P.* 286, 5th ed.; 326, 6th ed.; 322, 7th ed.; but see *Sug. V. & P.* 377, 428.

(*r*) *Roffey v. Shallcross*, 4 Madd. 227.

(*s*) *Re Arnold*, 14 Ch. D. 270; see above, pp. 33, 43, 167.

(*t*) *Hooper v. Smart*, L. R. 18 Eq. 683; *Horrocks v. Rigby*, 9

Ch. D. 180; see above, p. 43; below, Chap. XII. § 4.

(*u*) See *Wms. Real Prop.* 186, 187, 21st ed.; *Wms. Pers. Prop.* 381, 382, 407, 16th ed.

(*x*) *Wms. Real Prop.* 420, 13th ed.; 541, 21st ed.

(*y*) Stat. 45 & 46 Vict. c. 38, s. 22 (5, 6).

(*z*) *Re Walker*, 1908, 2 Ch. 705, 712; *Re Gibbon*, 1909, 1 Ch. 367, 378.

from the sale of certain freehold lands limited in strict settlement, is insufficient to invest the money with the quality of real estate in equity; and in such case the absolute property in the money will vest, as personalty, in the person entitled to the first estate tail under the settlement (*a*). So also, where a purchaser of land keeps on foot for his own benefit a mortgage affecting it, he remains entitled to the mortgage as his personal property (*b*). Similarly, in order to invest land in equity with the character of personalty, there must be an imperative trust for sale. Where land is given to trustees on trust for certain persons, with a mere power of sale at the trustees' discretion, and a direction that the beneficiaries shall at once be entitled to their respective interests as personalty (a mode of disposition by no means infrequent in ill-drawn wills), the direction is entirely ineffective, and until actual sale the beneficiaries take the property as realty (*c*).

§ 6.—*Sale of purely Incorporeal Hereditaments.*

Upon the purchase of purely incorporeal hereditaments, the general rule as to the title required to be shown is the same as upon the purchase of land, that is to say, if the incorporeal hereditament be sold in fee and under an open contract, forty years' title, commencing with a good root of title, must be shown (*d*). This applies equally to the sale of a seigniority, a rent-charge, a *profit à prendre*, a franchise, or an easement. The exceptions are those already noted (*e*) of the sale of

Sale of purely
incorporeal
heredita-
ments.

a) *Re Walker*, 1908, 2 Ch. 705; and see above, pp. 369, 370 and n. (*r*).

b) *Re Gibbon*, 1909, 1 Ch. 367.

c) See authorities cited in note (*z*), above, p. 432; *A.-G. v. Mangles*, 5 M. & W. 120; *A.-G. v. Simcox*, 1 Ex. 749; *Adv.-Gen.*

v. Smith, 1 Macq. 760. Cf. *Watson v. Black*, 16 Q. B. D. 270.

d) See above, pp. 98, and n. (*u*), 100, 106, 107; *Re Earnshaw Wall*, 1894, 3 Ch. 156, 158.

e) Above, pp. 97, 101.

Contract to grant an incorporeal hereditament *de novo*.

tithe or other property held under a grant from the Crown, and of an advowson. Upon a contract to grant in fee a new incorporeal hereditament to be exercisable over or issue out of the grantor's land, such as a right of way or a rent-charge, the same title must be shown to all the land, which will be subject to the grant, as upon a sale thereof (*f*).

Rent-charge.

On the sale of a rent-charge in fee, besides the documentary title, evidence must be given that the vendor is in actual receipt of the rent sold, as in the case of a sale of ground rent (*g*). This is the more necessary on the sale of a rent-charge, in that such a rent may be barred and extinguished after twelve years' non-payment under the Statute of Limitations (*h*). The purchaser should inquire of the terre-tenant whether he pays the rent in question to the vendor (*i*). Purchasers of perpetual rents, whether rents service, rents-charge or rents seck, should not forget that a rent in fee, not being a tithe rent-charge or a rent reserved on a sale or lease or made payable under a grant or licence for building purposes, is redeemable on the requisition of any person interested in the land, out of which the rent issues, at an amount of money to be certified by the Board of Agriculture (*k*). With regard to the remedies to which a purchaser of a rent in fee will become entitled, rents seck are of course now recoverable by distress equally with rents-charge (*l*); owners of rents

Perpetual rents, when redeemable.

Remedies of owners of rents.

(*f*) *Beddington v. Atlee*, 35 Ch. D. 317, 329, 331; *R. Stewart*, 41 Ch. D. 194, 500. The principle of this is the same which was applied in deciding that one, who contracted to grant a lease for years, was bound to show a good title to the freehold of the lands to be leased: above, p. 97, n. (*m*); *Fildes v. Hooker*, 2 Mer. 424.

(*g*) Above, p. 398.

(*h*) See *James v. Salter*, 3 Bing. N. C. 544; *Grant v. Ellis*, 9 M. & W. 113; *De Beauvoir v. Owen*,

5 Ex. 166; *Dean of Ely v. Bliss*, 2 De G. M. & G. 459, 472; *Irish Land Commrs. v. Grant*, 10 App. Cas. 14, 20, 27; *Hovatt v. Harrington*, 1893, 2 Ch. 497, 504, 507; *Shaw v. Crompton*, 1910, 2 K. B. 370, 376.

(*i*) See above, p. 399.

(*k*) Stats. 41 & 45 Vict. c. 41, s. 45; 52 & 53 Vict. c. 30, s. 2.

(*l*) Stat. 4 Geo. II. c. 28, s. 5; Wms. Real Prop. 428, 429, 21st ed.

have, since the abolition of real actions, been allowed a remedy by suing the terre-tenant personally (*m*); and they may apply to a Court of Equity to order any arrears of the rent to be raised by sale or mortgage of the land, out of which it issues, the granting of such relief being discretionary (*n*). Where the rent sold is a rent-charge in fee created on a grant of land for building purposes in consideration of a rent-charge, it will of course be borne in mind that any covenant contained in the deed of grant that the grantee, his heirs and assigns will pay the rent or build on the land is only a personal covenant and will not run with the land, either at law or in equity, so as to be enforceable against the grantee's assigns (*o*). Where on such a grant the rent-charge and the grantee's estate have been limited by way of use to be executed by the Statute of Uses (*p*), and there has been a proviso allowing the grantor, his heirs or assigns, on non-payment of the rent or breach of covenant to re-enter and hold the land charged in fee, it appears, according to modern doctrine (*q*), that the right of re-entry is void, at least as regards the grantor's heirs and assigns, unless it were so limited that it must necessarily arise within the period allowed by the rule against perpetuities. But a power given on such a grant of a rent-charge in fee for the grantee, his heirs or assigns, to enter on the land charged, in case of non-payment of the rent, and hold

Covenant to
pay a rent-
charge.

Proviso for
re-entry on
non-payment
of rent-charge.

(*m*) *Thomas v. Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn, &c. Building Society, Ex parte Graham*, 42 Ch. D. 343; *Searle v. Cooke*, 43 Ch. D. 519; *Pettice v. Townsend*, 1896, 2 Q. B. 129; *Re Herbage Rents*, 1896, 2 Ch. 811; *Foley's Charity Trustees v. Dudley Corpn.*, 1910, 1 K. B. 317. The decision in *Thomas v. Sylvester* is criticised by the author in L. Q. R. xiii. 288.

(*n*) *Hambro v. Hambro*, 1894, 2 Ch. 564.

(*o*) *Haywood v. Brunswick, &c. Building Society*, 8 Q. B. D. 403; *Austerberry v. Oldham*, 29 Ch. D. 750.

(*p*) Stat. 27 Hen. VIII. c. 10.

(*q*) *Dann v. Flood*, 25 Ch. D. 629, 28 Ch. D. 586, 592; *Re Hadley's Hospital and Hague's Contract*, 1899, 2 Ch. 540, 554; Gray, Rule against Perpetuities, § 303. See below, Chap. XII. Sect. 3.

the land until all arrears of the rent and all expenses shall have been discharged, appears to stand upon a different footing. Such a power is regarded as remedial only and as being part of the estate which the grantee has in the rent; and whether the power be conferred in express words or by virtue of the 44th section of the Conveyancing Act of 1881 (*r*), there appears to be no good reason for supposing that the same is invalid, if not limited to arise within the period allowed by the rule against perpetuities (*s*). Here the reader may be reminded that, before the 13th of August, 1859, a release by the owner of a rent-charge of part of the lands, out of which the rent issued, had the effect of entirely extinguishing the rent-charge (*t*). Since then, if such a release be made, the right only to recover any part of the rent-charge out of the lands released is barred; and the lands not included in the release remain liable, not to the whole rent-charge, but only to a part thereof proportionate to their value (*u*). It appears, however, that this alteration of the law does not extend to a rent seek, which seems to remain on the same footing, in respect of apportionment, as a rent-charge stood at common law (*x*).

Release of
part of land
subject to a
rent-charge.

Release of
part of land
subject to a
rent-seek.

Registration
of a rent-
charge, where
necessary.

No registration is required to perfect in any way the grant of a rent in fee or in tail. But an annuity or rent-charge granted, otherwise than by marriage settlement or will, for a life or lives or for any estate

(*r*) Stat. 44 & 45 Vict. c. 41.

(*s*) *Haverhill v. Hare*, Cro. Jac. 510; Sugd. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; Davidson, Prec. Conv. vol. ii. part i. 508, 511, and notes, 4th ed.; Gray, Rule against Perpetuities, § 303. See below, Chap. XII. Sect. 3.

(*t*) Litt. ss. 222, 224; *Dennett v. Pass*, 1 Bing. N. C. 388; Wms. Real Prop. 437, 438, 21st ed.

(*u*) Stat. 22 & 23 Vict. c. 35, s. 10; *Booth v. Smith*, 14 Q. B. D. 318.

(*x*) See Litt. ss. 217—227; Co. Litt. 147 b, 150 b; Gilb. Tenures, 402 and n. lvii., 4th ed. All rent service payable in money, whether incident to a seignior or reserved on a lease for years, is apportionable at common law; Litt. ss. 222, 223; Co. Litt. 148 a, 149 b.

determinable on a life or lives, must be registered in the Office of Land Registry against the name of the person, whose estate is intended to be affected, otherwise the same will not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors (*y*). Purchasers, however, who take with notice of such annuities or rent-charges, are bound by them in equity, although they be not registered (*z*). Rent-charges coming within the definition of a land charge contained in the Land Charges Act, 1888, and created after that year, must be duly registered at the Office of Land Registry, or they will be void as against a purchaser for value of the land charged, or any interest therein (*a*). And similar rent-charges previously created but assigned by act *inter vivos* after that year must be duly registered at the Office of Land Registry. For the same Act further provides that, after the expiration of one year from the first assignment made by act *inter vivos* after the year 1888 of a similar rent-charge previously created, the person entitled thereto shall not be able to recover the same as against a purchaser for value of the land charged, or any interest therein, unless the charge be so registered

(*y*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14, passed 26th April, 1855, and applying to annuities or rent-charges granted after the passing of the Act. The registration was formerly required to be made in the Court of Common Pleas, and afterwards in the Central Office of the Supreme Court; see stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Ord. LXI.; stat. 63 & 64 Vict. c. 26, s. 1, and Order thereunder, W. N. 18th Aug. 1900.

(*z*) *Greaves v. Tofield*, 14 Ch. D. 563.

(*a*) Stat. 51 & 52 Vict. c. 51, s. 12. By sect. 4, "land charge" means a rent, or annuity or principal moneys payable by instal-

ments, or otherwise, with or without interest, charged otherwise than by deed upon land under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the 35th section of the Land Drainage Act, 1861, or under the 29th section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

before the completion of the purchase (*b*). The rent-charges, to which these provisions apply, are mainly those created under the Improvement of Land Act, 1864 (*c*), or other Land Improvement Acts (*d*). By the Improvement of Land Act, 1899 (*e*), rent-charges created either before or after that Act under the Improvement of Land Act, 1864, or any special Improvement Act, shall be recoverable, as regards any instalment accruing due after the year 1899, by the like remedies as are provided by the Conveyancing Act of 1881 in respect of rent-charges thereafter created, *and not otherwise*. This appears to preclude the owners of such rent-charges from recovering such arrears by personal action against the terre-tenant under the doctrine laid down in *Thomas v. Sylvester* (*f*). When a rent-charge sold is of such a kind that it requires registration, the conveyancer advising the purchaser should of course inquire whether the necessary registration was duly made. If not, he should object to the title, unless the defect should be removable by subsequent registration, as it might be if since the grant of the rent-charge there had been no dealing for value with the land charged.

Tithe rent-charge.

Lands sold as tithe-free.

An inappropriate tithe rent-charge, being of course a rent-charge in commutation of tithes (*g*), is subject to the rules already mentioned as to proof of title on the sales of tithes (*h*). And when lands are sold as tithe-free owing to the merger of the tithe rent-charge therein (*i*), the title to the tithes prior to the merger

(*b*) Stat. 51 & 52 Vict. c. 51, s. 13. By sect. 4, in this Act "purchaser for value" includes a mortgagee or lessee or other person who for valuable consideration takes any interest in land or a charge on land.

(*c*) Stat. 27 & 28 Vict. c. 114.

(*d*) See Wms. Real Prop. 126, 21st ed.

(*e*) Stat. 62 & 63 Vict. c. 46, s. 3.

(*f*) Above, p. 435, n. (*m*).

(*g*) Wms. Real Prop. 448, 21st ed.

(*h*) Above, p. 101.

(*i*) A tithe rent-charge can only be merged by the execution of some instrument under stats. 6 & 7 Will. IV. c. 71, s. 71; 1 & 2

must be shown in the absence of stipulation to the contrary. If the tithes should have been merged more than forty years before the sale, the grant of the tithes from the Crown and, apparently, the instrument of merger must still be produced (*k*). If lands be sold as tithe-free, and the exemption be alleged to arise from other cause than merger (*l*), the facts giving rise to the exemption must be strictly proved (*m*). And if land sold as tithe-free should not be free from tithe, the purchaser will not be compelled to take the title (*n*).

The length of title which must be shown on a sale of Advowson.
an advowson under an open contract has been already noticed (*o*). On the sale of an advowson, the abstract of title should be accompanied with or comprise a list of the presentations made during the time for which title has to be deduced, so as to show that enjoyment has gone along with the title (*p*). The purchaser should verify this list of presentations by examination of the bishop's institution book or diocesan register of institutions, the entry in which is, next to the presentation itself (if in writing), good evidence of the presenta-

Vict. c. 64; 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, ss. 18, 19. It does not merge by the mere fact of the union in the same person of the estate in the land and in the tithes: Shelford on Tithes, 292, n., 3rd ed.

(*k*) Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.; 331, 7th ed. But any instrument purporting to merge any tithes or rent-charge, and executed with the consent of the Tithe Commissioners before the passing of stat. 9 & 10 Vict. c. 73, s. 19 (26th August, 1846), is valid and effectual to merge the tithes, although the person purporting to merge the tithes had no estate therein: *Walker v. Bentley*, 9 Hare, 629. The pro-

duction of such an instrument appears, therefore, to be sufficient proof of the merger of the tithe.

(*l*) See Burton's Compendium, ch. 6, sect. 4; stats. 2 & 3 Will. IV. c. 100; 4 & 5 Will. IV. c. 83; *Salkeld v. Johnston*, 1 Mac. & G. 242.

(*m*) Dart, V. & P. 354—356, 1075, n. (*k*), 5th ed.; 401, 402, 1201, n. (*g*), 6th ed.; 396, 397, 7th ed.; above, p. 176, and n. (*z*).

(*n*) *Ker v. Clobury*, Sug. V. & P. 321; *Binks v. Rokeby*, 2 Swanst. 222.

(*o*) Above, p. 101.

(*p*) Sug. V. & P. 367; 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; 329, 7th ed.; 1 Davidson, Prec. Conv. 527, 4th ed.; 439, 5th ed.

tion (*q*). The law relating to the sales of advowsons is now regulated by the Benefices Act, 1898 (*r*). Prior to that Act, an advowson was as freely saleable and transferable as any other real property, subject only to the laws by which any presentation made to an ecclesiastical benefice in consideration of any profit or benefit was void as simoniacal (*s*). With respect to this, the following distinctions were established:—It was not simoniacal for any person, whether layman or clerk, to purchase an advowson, either in fee or for any less estate, while the church was full; and the conveyance on such a purchase would carry with it the right of next presentation, however immediate were the prospect of a vacancy at the time of sale, provided that the vacancy were not occasioned by some agreement or arrangement between the parties (*t*). And if a clerk so purchased an estate in fee or for life in an advowson, he might present himself to the living (*u*). But any agreement or arrangement between the parties to the sale of an advowson for causing the living to become vacant was simoniacal; and a presentation made upon any vacancy so caused was void, and the right of presentation for the next turn became forfeited to the Crown (*x*). A sale of an advowson made while the church was vacant did not carry with it the right of next presentation (*y*), but was in other respects perfectly valid and passed the right of presentation for all subsequent turns. And if an

(*q*) See *Tillard v. Shebbeare*, 2 Wils. K. B. 366. The register appears to be such a public document as is admissible in evidence on mere production from its proper custody: 1 Phillimore, Eccl. Law, 354, 355, 2nd ed.; *R. v. Bishop of Ely*, 8 B. & C. 112; see above, pp. 122, 123.

(*r*) Stat. 61 & 62 Vict. c. 48.

(*s*) *Barret v. Glubb*, 2 W. Bl. 1052; *Fox v. Chester*, 3 Bli. N. S. 123; *Exeter v. Marshall*, L. R. 3

H. L. 17, 45, 52; *Walsh v. Lincoln*, L. R. 10 C. P. 518; see Bac. Abr. Simony.

(*t*) See preceding note.

(*u*) See *Walsh v. Lincoln*, L. R. 10 C. P. 518; *Low v. Chester*, 10 Q. B. D. 407.

(*x*) Stat. 31 Eliz. c. 6, s. 5; Abbott, C. J., *Fox v. Chester*, 2 B. & C. 635, 660; Cripps' Laws of the Church, 475, 476, 6th ed.

(*y*) *Alston v. Atlay*, 7 A. & E. 289.

advowson were sold and conveyed while the church was full and at the same time a simoniacal arrangement were made for causing a vacancy, the next presentation only was forfeited to the Crown, and the conveyance was otherwise good and passed the right of presentation for the succeeding turns (*z*). And the sale of the right of next presentation only was valid if made while the church was full (*a*), though not if it were vacant; but a clerk was prohibited from purchasing a next presentation in order to present himself to the living (*b*).

By the Benefices Act, 1898 (*c*), a transfer of a right of patronage of a benefice shall not be valid unless (1) it is registered in the prescribed manner (*d*) in the registry of the diocese within one month from the date of the transfer, or within such extended time as under special circumstances the bishop may think fit to allow; (2) it transfers the whole interest of the transferor in the right except as thereafter provided; and (3) more than twelve months have elapsed since the last institution or admission to the benefice. The expression *transfer* here includes any conveyance or assurance passing or creating any legal or equitable interest *inter vivos*, and any agreement for such conveyance or assurance; but does not include a transfer on marriage, death, or bankruptcy, or otherwise by operation of law, or a transfer on the appointment of a new trustee where no beneficial interest passes (*e*). And nothing in this enactment shall prevent the reservation or limitation in a family settlement of a life interest to the settlor, or in a mortgage the reservation of a right of redemption (*f*).

Benefices Act,
1898.

(*z*) *Greenwood v. London*, 5 Taunt. 727.

(*a*) *For v. Chester*, 3 Bli. N. S. 123.

(*b*) Stat. 12 Anne, st. 2, c. 12, s. 2.

(*c*) Stat. 61 & 62 Vict. c. 48, s. 1 (1).

(*d*) See Benefices Rules, 1898, W. N. 7th Jan. 1899.

(*e*) Sect. 1 (6).

(*f*) Sect. 1 (7).

The Act also invalidates (*g*) any agreement for any exercise of a right of patronage of a benefice in favour or on the nomination of any particular person, and any agreement on the transfer of a right of patronage of a benefice for the resignation of a benefice in favour of any person. Any conveyance either of an advowson or a next presentation must now conform with the requirements of this Act or it will be invalid. Thus it appears that the conveyance of an advowson by way of family settlement must be registered and must in other respects conform with the provisions of the Act: whilst a conveyance of an advowson by way of marriage settlement remains exempt from the requirements of the Act as to transfer, including the necessity of registration. And it seems that these rules apply equally to the transfer of an advowson appendant or in gross. The second requirement imposed by the Act appears to invalidate sales or grants by the owners of an advowson (*h*) of the next presentation or any less estate or interest than the whole fee simple in the advowson; except only by way of reservation or limitation in a family settlement of a life interest to the settlor, or of reservation in a mortgage of an equity of redemption. And it is to be noted that, even in a family settlement, only the limitation of a life interest to the settlor is allowed; so that the limitation in such a settlement of an advowson by a settlor entitled in fee simple to the use of himself in tail or for any term of years appears to be invalid. If, however, the grantor transfer the whole of his own estate in the advowson by way of family settle-

(*g*) Sect. 1 (3). By sect. 2 (1a), a bishop may refuse to institute or admit a presentee to a benefice if at the date of the vacancy not more than one year has elapsed since a transfer as defined by the first section of this Act of the right of patronage of the bene-

fice, unless it be proved that the transfer was not effected in view of the probability of a vacancy within such year.

(*h*) The right of next presentation obviously remains transferable where it constitutes the whole interest of the transferor.

ment, the limitation of estates for years, for life, or in tail, with an ultimate remainder in fee simple to other persons than himself, does not appear to offend against the statute. But where the ultimate remainder in fee simple is limited to the use of the grantor, the Act seems to be infringed and the transfer to be invalid. And this seems to be the case where a life interest is reserved to the grantor, with intermediate limitations to others and an ultimate remainder in fee to himself. The Act also provides (*i*) that it shall not be lawful to offer for sale by public auction any right of patronage, except in the case of an advowson to be sold in conjunction with any manor, or with an estate in land of not less than one hundred acres situate in the parish in which the advowson is situate, or in an adjoining parish and belonging to the same owner as the advowson.

Prohibition
as to sales of
advowsons by
auction.

Upon the sale of an advowson when the church is full, the legal right to present on the next vacancy remains with the vendor until the sale be completed by conveyance (*k*); but in equity the right of presentation belongs to the purchaser as from the date of the contract for sale, subject to the condition of his accepting the title. If, therefore, a vacancy occur before completion, the purchaser, having first accepted the title, may require the vendor to present to the living such person as the purchaser may select (*l*). But if the living became vacant by the promotion of the incumbent to

Right of
presentation
pending
completion of
sale of an
advowson.

(*i*) Sect. 1 (2), whereby also any person offering any right of patronage for sale by auction in contravention thereof, or bidding at any such sale, is rendered liable on summary conviction to a fine not exceeding 100*l*.

(*k*) 17 Vin. Abr. Presentation, 319, pl. 11.

(*l*) *Fox v. Chester*, 3 Bli. N. S. 123, 155—157; *Nicholson v. Knapp*, 9 Sim. 326; *Dowling v. Maguire*, Ll. & G. t. Plunk. 1, 30; *Greenslade v. Dars*, 17 Beav. 502.

the bishopric of a see in England, the Crown is entitled to present for that turn (*m*).

Devices
formerly used
on sale in
expectation of
a vacancy.

When an advowson or a next presentation was sold in expectation of an early avoidance of the living, various devices were resorted to in order to protect the purchaser in case the expected avoidance did not take place. Thus it was sometimes provided in the contract for sale that the purchase money should on completion be deposited with trustees to be paid over to the vendor if the vacancy occurred within a specified time, but otherwise to be returned to the purchaser and the advowson to be reconveyed to the vendor (*n*). Or it was stipulated that the *vendor* should pay interest on the purchase money from the date fixed for completion until the benefice should become vacant (*o*); and such a stipulation was held not to be void as simoniacal on the sale of an advowson, where the vendor was not the incumbent (*p*). Or it was agreed that the vendor should re-purchase the advowson, if the living were not avoided within a certain time. But now, by the Benefices Act, 1898 (*q*), any agreement on the transfer of a right of patronage of a benefice either (i) for re-transfer of the right, or (ii) for postponing payment of any part of the consideration for the transfer until a vacancy or for more than three months, or (iii) for payment of interest until a vacancy or for more than three months, or (iv) for any payment in respect of the date at which a vacancy occurs, shall be invalid.

(*m*) *Grocers' Co. v. Archbp. of Canterbury*, 3 Wils. K. B. 214, 232, 233; *R. v. Eton College*, 8 E. & B. 610.

(*n*) Davidson, *Prec. Conv.* vol. ii. part i. 30, 35, 4th ed.

(*o*) Davidson, *Prec. Conv.*

vol. ii. part i. 37, 41, 4th ed.; 1 Key & Elphinstone, *Prec. Conv.* 632, n., 4th edit.

(*p*) *Sweet v. Meredith*, 3 Giff. 610, 8 Jur. N. S. 637.

(*q*) Stat. 61 & 62 Vict. c. 48, s. 1 (3).

§ 7.—*Sale of Charity Lands.*

On the sale of any hereditaments which are or have Charity lands. been subject to any charitable uses or trusts (*r*), there are two main points to be considered by the conveyancer advising on the title; first, whether the hereditaments were duly assured in accordance with Part II. of the Mortmain and Charitable Uses Act, 1888 (*s*), or the statutes now replaced by that enactment (*t*), to the charitable uses on which it is alleged that they are or were held; and secondly, whether any conveyance of such hereditaments agreed by the contract of sale to be made or purported to be made by any of the documents of title is or was subject to the restrictions imposed by the 29th section of the Charitable Trusts Amendment Act, 1855 (*u*), and if so, whether the conditions thereby imposed have been complied with. The first of these requirements must also be observed on the purchase of any hereditaments to be assured to any charitable uses. Besides which, if the title should comprise a conveyance to a *corporation* for charitable purposes, it must be ascertained that the same was made in conformity with the law of conveyance to a corporation into mortmain, now contained in Part I. of the Mortmain and Charitable Uses Act, 1888.

By Part II. of the Mortmain and Charitable Uses Act, 1888 (*x*), subject to the savings and exceptions in Requisites of the conveyance of land to charitable uses.

(*r*) As to what uses or trusts are charitable, see *Income Tax Commrs. v. Pemsel*, 1891, A. C. 531, 583; *Hunter v. A.-G.*, 1899, A. C. 309; Tudor's Charitable Trusts, Chap. I.; 1 Jarm. Wills, 166, 5th ed.

(*s*) Stat. 51 & 52 Vict. c. 42, amended by 54 & 55 Vict. c. 73.

(*t*) Stats. 9 Geo. II. c. 36

(commonly called the Mortmain Act); 9 Geo. IV. c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 27 & 28 Vict. c. 13; 29 & 30 Vict. c. 57; 31 & 32 Vict. c. 44; 34 & 35 Vict. c. 13; 35 & 36 Vict. c. 24.

(*u*) Stat. 18 & 19 Vict. c. 124.

(*x*) Stat. 51 & 52 Vict. c. 42, s. 4.

the Act contained, and to the amendments now made (*y*) as stated below with respect to assurances by will, every assurance (*z*) of land to or for the benefit of any charitable uses shall be made in accordance with the requirements of this Act, and unless so made shall be void (*a*). These requirements are that the assurance must be made—(1) by deed (2) executed in the presence of at least two witnesses (3) twelve months at least before the assurator's death (*b*) and (4) enrolled in the Central Office of the Supreme Court within six months after the execution thereof; and (5) must be made to take effect in possession for the charitable use intended immediately from the making thereof, and (6) must, except as in the Act provided (*c*), be without any power

Assurance.

(*y*) By stat. 54 & 55 Vict. c. 73; see p. 454, below.

(*z*) By stat. 51 & 52 Vict. c. 42, s. 10, in this Act, unless the context otherwise requires, "assurance" includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will or other instrument; and "assure" and "assuror" have meanings corresponding with assurance. Independently

of statute, any transaction which operates to transfer the property in lands or goods and any document evidencing such a transaction is an assurance; see *Shep. Touch.* 1; 2 *Black. Comm.* 294; *Re Roberts*, 36 Ch. D. 196; *Re Ray*, 1896, 1 Ch. 468, 476. Cf. above, p. 377, n. (*z*).

a) See *Churcher v. Martin*, 42 Ch. D. 312.

(*b*) Including in those twelve months the days of the making of the assurance and of the death.

(*c*) By stat. 51 & 52 Vict. c. 42, s. 4 (4), the assurance, or any instrument forming part of the same transaction, may contain all or any of the following provisions; so, however, that they reserve the same benefits to persons claiming under the assuror as to the assuror himself, namely—

- (i.) The grant or reservation of a peppercorn or other nominal rent;
- (ii.) The grant or reservation of mines or minerals;
- (iii.) The grant or reservation of any easement;
- (iv.) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighbouring land;
- (v.) A right of entry on non-payment of any such rent or on breach of any such covenant or provision;
- (vi.) Any stipulations of the like nature for the benefit of the assuror, or any person claiming under him.

of revocation, reservation, condition or provision for the benefit of the assurator or any person claiming under him. The first and second of these requirements do not apply to assurances of land of copyhold or customary tenure (*d*). The third requirement, whereby any assurance of land to any charitable uses may become void by reason of the assurator's death within a year after the execution thereof, is not imposed on assurances of land made in good faith for full and valuable consideration; and this is equally the case whether such consideration be actually paid upon or before the making of the assurance, or be reserved or made payable to the vendor or any other person by way of rent, rent-charge or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry for non-payment thereof, or partly paid and partly reserved as aforesaid (*e*). Any assurance of land, which is by the Act required to be made by deed, may be made by a registered disposition under the provisions of the Land Transfer Acts, 1875 and 1897, and if so made shall be exempt from the requirements of the Act of 1888 as to execution in the presence of witnesses and as to enrolment (*f*). And enrolment is not required of an assurance of land to or for the benefit of any charitable uses, if those uses are declared by a separate instrument, but in such case that separate

Assurance by registered disposition under the Land Transfer Acts.

Enrolment of separate deed of trust.

By sect. 4 (5), if the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rent-charge, or other annual payment reserved or made payable to the vendor, or any other person, with or without a right of re-entry for non-payment thereof: see also sect. 10 (iv.).

These enactments replace stat. 24 & 25 Vict. c. 9, s. 1 (passed 17th May, 1861), by which exceptions were first introduced to the rule of stat. 9 Geo. II. c. 36, that the assurance must be without any provision for the benefit of the grantor. This must not be forgotten in considering the effect of assurances to charitable uses made before that date.

(*d*) See stat. 51 & 52 Vict. c. 42, placing stats. 9 Geo. II. c. 36, s. 2; 27 & 28 Vict. c. 13, s. 4.

(*e*) See sects. 4 (7), 10 (iv.), re- (*f*) Stat. 51 & 52 Vict. c. 42, s. 9.

Power to
enrol instru-
ments not
enrolled
within due
time.

instrument must be enrolled in the Central Office within six months after the making of the assurance of the land (*g*). Where any such assurance or instrument has not been duly enrolled within the requisite time, the High Court of Justice, or the officer having control over the enrolment of deeds in the Central Office, is empowered to order or cause the same to be subsequently enrolled; but this power is only exercisable where the Court or officer is satisfied, first, that the omission to enrol in proper time has arisen from ignorance or inadvertence, or through the destruction or loss of the document (*h*); and, secondly, that the assurance was of a nature to be validated under the enabling enactment in that behalf. This provides that if the assurance to be validated was made in good faith and for full and valuable consideration, and was made to take effect in possession immediately from the making thereof without any power of revocation, reservation, condition, or provision, except such as is authorised by the Act (*i*), and if, at the time of the application for enrolment, possession or enjoyment was held under the assurance, then such subsequent enrolment shall have the same effect as if it had been made within the requisite time; but such subsequent enrolment shall not give any validity to the assurance if at the time of such application any proceeding for setting aside the assurance or for asserting any right founded on the invalidity of the assurance is pending, or any decree or judgment founded on such invalidity has been obtained (*k*). Where an assurance of land to any charitable uses has not been executed in the presence of two witnesses, or has otherwise failed

(*g*) Stat. 51 & 52 Vict. c. 42, s. 4 (6), replacing 24 & 25 Vict. c. 9, s. 2.

(*h*) In such case some copy or abstract thereof, or some subsequent instrument by which the

trusts sufficiently appear, may be enrolled.

(*i*) Above, p. 446, n. (*c*).

(*k*) Stat. 51 & 52 Vict. c. 42, s. 5, replacing 35 & 36 Vict. c. 24, s. 13; 29 & 30 Vict. c. 57.

to comply with the requirements of the Act, except only in respect of want of due enrolment, there is no power subsequently to amend the defect and the assurance remains altogether void (*l*). And an assurance failing to comply with the requirements of the Act is equally void whether the intended charitable uses or trusts appear from the assurance itself, from some separate instrument or from other circumstances; so that if the trustees of a charity buy land with money belonging to the charity and take a conveyance to themselves, not disclosing their trust, the conveyance will be void unless made in accordance with the Act. And it must not be forgotten that conveyances of land to a charity for valuable consideration are void, as well as voluntary conveyances, if not made in accordance with the statutory requirements (*m*). If, however, the grantees under any assurance which is void for non-compliance with the present or former Mortmain Act (*n*) should have entered into possession of the land purported to be thereby assured, and remained in such possession long enough for the assurator's title to be extinguished under the Statutes of Limitation (*o*), they will have a good title to the land (*p*). The above-mentioned restrictions of the Mortmain and Charitable Uses Act, 1888 (*q*), and the Mortmain Act of George II. (*r*) were imposed on the assurance to any charitable uses not only of land, but also of any tenements or hereditaments, corporeal or incorporeal, of whatsoever tenure,

No power to amend other defects than want of enrolment.

The assurance will be void though the charitable trusts be not disclosed.

The charity may gain title under the Statutes of Limitation.

To what interests in land the Act extends.

(*l*) See *Wickham v. Bath*, L. R. 1 Eq. 17; *Webster v. Southey*, 36 Ch. D. 9.

(*m*) See *Doe d. Willard v. Hawthorn*, 2 B. & A. 96, 101—103; *Doe d. Preece v. Howells*, 2 B. & Ad. 744; *A.-G. v. Gardner*, 2 De G. & S. 102; *A.-G. v. Munro*, *ib.* 122; *Bunting v. Sargent*, 13 Ch. D. 330; *Webster v. Southey*, 36 Ch. D. 9.

(*n*) Above, p. 445, notes (*s*, *t*).

(*o*) Stat. 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57.

(*p*) See *A.-G. v. Gardner*, 2 De G. & S. 102; *A.-G. v. Munro*, *ib.* 122; *Churcher v. Martin*, 42 Ch. D. 312.

(*q*) Stat. 51 & 52 Vict. c. 42, s. 10 (iii.).

(*r*) Stat. 9 Geo. II. c. 36.

Assurance of personal estate to be laid out in purchase of land for a charity.

and any estate or interest therein. This had the effect of prohibiting the assurance to such uses, except in conformity with the statutory requirements, of money secured by mortgage of land and other property commonly called impure personalty (*s*). But now by the Mortmain and Charitable Uses Act, 1891 (*t*), the provisions of the Act of 1888, relating to the assurance of land to charitable uses, apply only to land and tenements and hereditaments, corporeal or incorporeal, of any tenure, and no longer extend to money secured on land or other personal estate arising from or connected with land. By the Act of 1888, as by that of George II., every assurance (*u*) of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, was subjected to the like restrictions as were thereby imposed on the assurance of land to such uses (*x*); but with respect to the assurance by will of personal estate for such purposes, the law is now altered by the Act of 1891 (*y*) as stated below.

Exemptions from the requirements of the Mortmain Acts.

Part III. of the Mortmain and Charitable Uses Act, 1888, makes the following exemptions from the provisions of Part II. of the Act:—

- (1.) An assurance of land, or personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges or houses of learning within any of those Universities, or to or in trust for any of the Colleges of Eton,

(*s*) See Wms. Pers. Prop. 465, 466, 16th ed.; 1 Jarm. Wills, 177, 5th ed.

(*t*) Stat. 54 & 55 Vict. c. 73, s. 3, repealing 51 & 52 Vict. c. 42, s. 10 (iii.).

(*u*) See above, p. 446, n. (*z*).

(*x*) Except that the transfer of stock in the public funds for such

purposes is not required to be made by deed executed in the presence of two witnesses or to be enrolled, and remains valid unless the transferor die within six months thereafter: stat. 51 & 52 Vict. c. 42, s. 4.

(*y*) Stat. 54 & 55 Vict. c. 73, s. 7; see pp. 454, 455, below.

Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned colleges, or to or in trust for the warden, council, and scholars of Keble College (*z*).

- (2.) An assurance, otherwise than by will, to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected, so that the assurance be made in good faith for full and valuable consideration (*a*).

- (3.) An assurance by deed of land of any quantity or an assurance by will of land of the quantity therein mentioned (*b*) for the purposes only of a public park, a school-house for an elementary school, a public museum (*c*), or an assurance by will of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only; provided that a will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration, must be executed not less than

(*z*) Stat. 51 & 52 Vict. c. 42, s. 7. (i.), replacing 9 Geo. II. c. 36, s. 4, except as to London, Durham and Victoria Universities and Keble College: see Tudor's Charitable Trusts, 467—470, 4th ed.

(*a*) Stat. 51 & 52 Vict. c. 42, s. 7 (ii.), replacing 31 & 32 Vict. c. 44, s. 1. Such assurance may,

however, be enrolled, if thought fit.

(*b*) Not exceeding twenty acres for any one public park, two acres for any one public museum, and one acre for any one school-house: stat. 51 & 52 Vict. c. 42, s. 6 (3).

(*c*) See s. 6 (4) for the definition of these terms.

twelve months before the death of the assuror, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed (*d*).

- (4.) Where by any statute in force any provision repealed by the Act of 1888 is excluded either wholly or partially from application or is applied with modification, in every such case the corresponding provision of that Act shall be excluded or applied in like extent or manner (*e*). This refers to the cases in which exemption from all or some of the restrictions imposed by the Mortmain Act of George II. has been granted by statute in favour either of particular charitable institutions or bodies or of assurances for certain particular purposes (*f*).

(*d*) Stat. 51 & 52 Vict. c. 42, s. 6, replacing 34 & 35 Vict. c. 13, and also exempting the assurances therein mentioned from the operation of Part I. of the Act: see above, p. 445.

By stat. 55 Vict. c. 11, this exemption is extended to any assurance by deed of land to a local authority for any purpose

for which such authority is empowered by any Act of Parliament to acquire land, without the requirement that an assurance not made for full valuable consideration must be executed not less than twelve months before the assuror's death.

(*e*) Stat. 51 & 52 Vict. c. 42, s. 8.

(*f*) See Tudor's Charitable Trusts, 470—476, 4th ed.; 1 Jarm. Wills, 202—204, 5th ed.; Index to Statutes, Mortmain, 2, 3. With regard to particular charitable institutions specially authorized by statute to take lands, where these are corporations, it must be considered whether they are exempted from the provisions of Part I. only of the Mortmain and Charitable Uses Act, 1888 (above, p. 445), or whether they have been granted a dispensation from the restrictions imposed by Part II. of the Act: see *Nethersole v. School for Indigent Blind*, L. R. 11 Eq. 1; *Chester v. Chester*, L. R. 12 Eq. 444; cf. *Perring v. Trail*, L. R. 18 Eq. 88. As to assurances for particular charitable purposes, there are numerous instances in which the Legislature has exempted the

Besides these exemptions, it was considered that the Mortmain Act of George II. (*g*) had no application in case of land, which was already in mortmain by reason of its being lawfully vested in a corporation; and it was decided on this ground that the conveyance of land to charitable uses by an ecclesiastical or an eleemosynary corporation was not subject to any of the restrictions imposed by that Act (*h*). And following the spirit of these decisions, it was further held that, when land had been once duly assured into mortmain by reason of its having been vested in trustees for charitable purposes, the conveyance thereof to other trustees or to another charity did not fall within the purview of the same Mortmain Act, and needed not to be made with any of the formalities therein prescribed (*i*). And as the Mortmain and Charitable Uses Act, 1888 (*k*), is mainly

assurance of land or of limited quantities of land for objects regarded as laudable from all or some of the requirements of Part II. of the Act of 1888, and also from the provisions of Part I. of the Act. Amongst these are the augmentation of benefices, the building of churches (see *Tudor's Charitable Trusts*, 473, 773 *sq.*, 785 *sq.*, 4th ed.), the provision of public recreation grounds (stat. 22 Vict. c. 27), and of dwellings for the working classes in populous places (stat. 53 & 54 Vict. c. 16), and the acquisition of land by institutions for promoting technical and industrial instruction and training (stat. 55 & 56 Vict. c. 29, s. 10). Other instances, in which also tenants for life or other limited owners are empowered to convey the whole estate in the land for the charitable purpose in question are the provision of sites for schools (stats. 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49), for literary, scientific and like institutions (stat. 17 & 18 Vict. c. 112), and for places of worship or burial (stats. 30 & 31 Vict. c. 133; 36 & 37 Vict. c. 50; 45 & 46 Vict. c. 21). Also, by stat. 33 & 34 Vict. c. 34, the investment on mortgage of land of any money held by any corporation or trustees for any public or charitable purpose is exempted from the restrictions now contained in Part II. of the Mortmain Act of 1888, and also from any forfeiture for alienation of land into mortmain: but in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure or otherwise barred or released, the same shall thenceforth be held in trust to be sold and converted into money, and shall be sold accordingly; and in any proceedings for redeeming or enforcing such security the decree shall direct (in default of redemption) a sale and not foreclosure.

(*g*) Stat. 9 Geo. II. c. 36.

(*i*) *Ashton v. Jones*, 28 Beav.

(*h*) *Walker v. Richardson*, 2 460.

M. & W. 882: *A.-G. v. Glyn*, 12 Sim. 84.

(*k*) Stat. 51 & 52 Vict. c. 42: see the title.

a Consolidation Act (*l*), it is thought that the exemptions so established apply equally under the present law.

Gift of land
by will to a
charity.

The Mortmain Acts obviously prohibited the gift by will to a charity of any interest in land (*m*). But by the Mortmain and Charitable Uses Act, 1891 (*n*), land may be assured by will to or for the benefit of any charitable use. In such case, however, the land is, as a rule, required to be sold within one year from the death of the testator, or such extended period (*o*) as may be determined by the High Court, a Judge thereof at chambers, or the Charity Commissioners (*p*); and if such time shall expire without completion of the sale of the land, it shall forthwith vest in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or the completion of

Construction
of Consoli-
dation Acts.

Codifying
Acts.

(*l*) Consolidation Acts, which are Acts passed for the purpose of expressing existing *statute* law in a new form, are construed on principles different from those which govern the construction of statutes enacting new law or codifying the existing common or judge-made law. Thus the provisions of Consolidation Acts are considered to be retrospective, contrary to the general rule applicable to other statutes: *Ex p. Todd*, 19 Q. B. D. 186, 195, 199; they are construed with reference to the state of law which existed at the time when the enactments consolidated were originally passed: *Mitchell v. Simpson*, 25 Q. B. D. 183; *Stewart v. Thames Conservators*, 1908, 1 K. B. 893, 902, 903; their construction will be determined by the cases decided upon the construction of the original enactments: *Re Budgett*, 1894, 2 Ch. 557; *Re Pickard*, 1894, 3 Ch. 704; *Norton v. Davison*, 1899, 1 Q. B. 401; *The Heather Bell*, 1901, P. 143, 272; and the Acts consolidated may be referred to as a

guide to the meaning of the consolidating Act, if ambiguous; *R. v. Abrahams*, 1904, 2 K. B. 859. Statutes purporting to codify the common law are construed primarily according to the expressions used therein, and not by reference to the previous law; *Bank of England v. Vagliano*, 1891, A. C. 107, 120, 144, 145, 160, 161.

(*m*) Above, p. 446.

(*n*) Stat. 54 & 55 Vict. c. 73 (passed 5th August, 1891), s. 5; see *Re Bridger*, 1894, 1 Ch. 297; *Re Hume*, 1895, 1 Ch. 422. The Act only applies to wills of testators dying after the passing thereof (sect. 9), and is not to limit or affect the exemptions contained in Part III. of the Mortmain and Charitable Uses Act, 1888 (above, p. 450), or to apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions or any of them apply (sect. 10).

(*o*) See *Re Sidebottom*, 1901, 2 Ch. 1.

(*p*) See note (*n*), above.

the sale thereof (*q*). And the assurance by will of any personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses is no longer rendered void; for the Act provides that any personal estate so assured shall be held to or for the benefit of the charitable uses specified as though there had been no direction to lay it out in the purchase of land (*r*). But the High Court, a Judge thereof at chambers, or the Charity Commissioners may, if satisfied that any land assured by will to or for the benefit of any charitable uses or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land is required for actual occupation for the purposes of the charity, and not as an investment, by order sanction the retention or acquisition, as the case may be, of such land (*s*). As we have seen (*t*), the Act also exempted money secured on land or other personal estate arising from or connected with land from the requirements of the Act of 1888 (*u*), thus allowing for the future the bequest to charities of impure personalty. It has been held that, where land is devised to trustees on trust to sell the same and hand over the proceeds of the sale to a charity, the bequest to the charity is of personal estate arising from land, and the case is governed by the last mentioned provision of the Act of 1891, and not by the provisions (*x*) relating to the devise of land to or for the benefit of any charitable use. In such case, therefore, the land is not required to be sold within a year after the testator's death; and the time for exercising the trust for sale is decided by the rules generally applicable to such trusts (*y*); but the trustees are bound to sell within a reasonable time, and cannot,

(*q*) Sect. 6; *Re Ryland*, 1903, 1903, 1 Ch. 467, 474.
1 Ch. 467.

(*r*) Sect. 7; see *Re Sutton*, 1901, (*t*) Above, p. 450.

2 Ch. 640. (*u*) Sect. 3.

(*s*) Sect. 8; see *Re Ryland*, (*x*) Sects. 5, 6, 8, above.

(*y*) Above, p. 256.

with the consent of the charity, postpone the sale indefinitely (z).

Contract to
sell land for
the use of
a charity.

It is a question whether a contract to sell land to be assured to some charitable use is affected by the provisions contained in Part II. of the Mortmain and Charitable Uses Act, 1888 (a). This depends on the question whether such a contract is an assurance of the land within the meaning of that Act (b); for every *assurance* (in the ordinary legal meaning of the word, apart from statute) of land to any charitable uses must be made in conformity with the Act and, unless so made, is void. Such a contract is not of course an assurance of any legal estate in the land: but it has the effect in equity of an immediate conveyance to the purchaser of the whole equitable estate in the land purchased (c); it operates in fact as a transfer of the equitable ownership of the property sold, and seems therefore to come within the definition of an assurance, unless the term, as used in the Act, is to be confined to conveyances of some legal estate or interest (d), or is not to extend to conveyances of the equitable estate effected by the rule of equity, that what is agreed to be done shall be treated as actually accomplished (e). Such a restriction of the term would have the remarkable result that, whilst an actual conveyance of land on the completion of a sale to a charity would be void (say) if it were attested by one witness only (f), a sale effected by a written contract and subsequent payment

(z) *Re Wilkinson*, 1902, 1 Ch. 841; *Re Sidebottom*, 1902, 2 Ch. 389; see also *Re Ryland*, 1903, 1 Ch. 467.

(a) Stat. 51 & 52 Vict. c. 42; above, p. 445.

(b) See above, p. 446, and n. (z).

(c) Above, p. 49; below, Chap. XI. § 1.

(d) The Act originally extended in express terms to assurances of land or any hereditaments, or any estate or interest therein, but was restricted by the Act of 1891 to assurances of land and hereditaments; see above, p. 450.

(e) See Wms. Real Prop. 183, 186, 187, 21st ed.

(f) See above, pp. 446—449.

of the purchase money without further conveyance would be unimpeachable, though the contract were not made by deed, nor attested by any witness, nor enrolled. A door would in fact be left open for evasion of the Act (*g*). It has been held that, where a contract for the sale of land to some charitable use had been actually completed by a deed of conveyance, which was void for non-compliance with the old Mortmain Act, the whole transaction was void in equity as well as at law, and the land was not subject to the charitable trusts as having been effectually appropriated thereto by the *contract* of sale (*h*). This seems to show that the contract for sale could not have had the usual effect of transferring the equitable ownership of the land sold to the purchaser; for if it had had that effect, the land would have remained subject to the charitable trusts, though the subsequent conveyance of the legal estate were void. But if the equitable ownership of the land were not transferred by the contract, that could only be because the contract was an assurance thereof not made as required by the Mortmain Act and therefore void (*i*).

(*g*) As to the way in which the Court has dealt with an attempted evasion of the Act, see *Wickham v. Bath*, L. R. 1 Eq. 17.

(*h*) *A.-G. v. Gardner*, 2 De G. & S. 102, 116, 118; cf. *A.-G. v. Munro*, ib. 122, as to enforcing charitable trusts against persons who have taken and remained in possession of land, as trustees for a charity under a conveyance void for non-compliance with the Mortmain Act.

(*i*) See stat. 9 Geo. II. c. 36, ss. 1, 3. It should be observed that sect. 1 of this Act contained an absolute prohibition against in any ways conveying to any charitable use any hereditaments for any estate or interest whatever unless with the formalities therein specified, and sect. 3 made void all assurances, made other-

wise than as directed by the Act, of any hereditaments or any estate or interest therein to any charitable use. The Act of 1888, though purporting to be a consolidating Act, does not reproduce in express terms the exact prohibition contained in sect. 1 of the old Act; see above, pp. 445, 454, and n. (*l*). It is thought that the *dictum* in *A.-G. v. Day*, 1 Ves. sen. 218, 222, that a sale effected by a written contract and payment (before conveyance) of the purchase money is sufficiently taken out of the Act, is not an authority for anything more than that the transaction is not liable to be avoided by the vendor's death within a year; for it seems indisputable that if in such case the sale were completed by a conveyance attested by one witness

On the other hand, it has been decided that an ordinary contract for the sale of land is neither an assurance within the meaning of the Yorkshire Registries Act, 1884 (*k*), nor a conveyance within the meaning of the Stamp Acts (*l*), on the ground, partly, that the contract does not operate as an immediate and unconditional transfer of the equitable estate to the purchaser, because such transfer is conditional on the vendor showing a good title. To this it may be replied that in the Yorkshire Registries Act, 1884 (*m*), the term *assurance* is specially interpreted, and has not its ordinary legal meaning apart from statute; that in the Stamp Acts a clear distinction is drawn between the stamps required for a contract and those necessary for a conveyance (*n*); and that, though the transfer of the equitable estate effected by a contract of sale is conditional on a good title being shown, the condition is in substance subsequent rather than precedent. If the contract be not rescinded or broken, the equitable estate vests in the purchaser as from the date of his entering into the contract (*o*); and if a good title be shown, he has no option of rejecting it (*p*). The real effect of the contract appears to be that the equitable ownership of the property sold is at once transferred to the purchaser, subject to the vendor being restored to his former ownership in case (contrary to the parties' main intention in making the sale) the contract be rescinded or broken (*q*). In this view of the transaction, the contract does appear to be an assurance to the purchaser of the equitable estate in the land sold. But it is certainly

only, the conveyance would be void.

(*k*) *Rodger v. Harrison*, 1893, 1 Q. B. 161; above, p. 377, n. (*z*).

(*l*) *Inland Revenue Commrs. v. Angus*, 23 Q. B. D. 579.

(*m*) Stat. 47 & 48 Vict. c. 54, s. 3; above, p. 377, n. (*z*).

(*n*) See *Inland Revenue Commrs.*

v. Angus, ubi sup.; above, p. 28 and n. (*e*); below, Chap. XII. § 3.

(*o*) Above, p. 49, and n. (*h*); below, Chap. XI. § 1.

(*p*) Above, pp. 35, 46; *Re Taylor*, 1910, 1 K. B. 562, 571, 572, 580; below, Chap. XII.

(*q*) See below, Chap. XIX. §§ 1, 2.

open to argument that the amendment made by the Act of 1891 (*r*) in restricting the Act of 1888 to assurances of any lands, tenements or hereditaments, and expressly repealing the old provisions applying to assurances of "any estate or interest therein," has the effect of confining the operation of the Act of 1888 to assurances of the legal estate in hereditaments (*s*). If however this argument should prevail, a simple declaration of trust made gratuitously in favour of a charity and evidenced by signed writing (*t*) would be sufficient to transfer to the charity the whole equitable estate in the lands affected; and the Courts would certainly struggle against this conclusion.

By sect. 29 of the Charitable Trusts Amendment Act, 1855 (*u*), it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge

Restriction
on the sale,
mortgage, or
leasing of
charity lands

(*r*) Stat. 54 & 55 Vict. c. 73, s. 3; above, pp. 450, 456, n. (*d*).

(*s*) See *Gentle v. Faulkner*, 1900, 2 Q. B. 267.

(*t*) See Wms. Real Prop. 190, 21st ed.; *Adlington v. Cann*, 3 Atk. 141, 150; *Boson v. Statham*, 1 Eden, 508, 513.

(*u*) Stat. 18 & 19 Vict. c. 124, passed 14th August, 1855. According to the previous law the alienation of charity lands was not absolutely prohibited, but was liable to be set aside if not provident and beneficial to the charity. And a sale or other alienation of charity lands might well be made under the direction of the Court of Chancery, or by the trustees of a charity acting under express powers conferred by the author of the trust. But if a sale or other disposition of charity lands were made by the trustees without the authority of

the Court or any such express powers, the burden lay on the purchaser or other person taking under the disposition of proving that the transaction was provident and beneficial to the charity; and if he failed to establish this the disposition would be set aside, unless the defence of purchase for value without notice of the trust or of the Statute of Limitations could be maintained. See *A.-G. v. Warren*, 2 Swanst. 291, 302; *A.-G. v. Hungerford*, 2 Cl. & Fin. 357; *A.-G. v. Brettingham*, 3 Beav. 91; *A.-G. v. South Sea Co.*, 4 Beav. 453; *Magdalen College, Oxford v. A.-G.*, 6 H. L. C. 189, 205, 213; *Re Ashton Charity*, 22 Beav. 288; *Re Clergy Orphan Corp.*, 1894, 3 Ch. 145, 164; *Re Mason's Orphanage and London and North Western Rail. Co.*, 1896, 1 Ch. 54, 59, 603, 604.

of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board of Charity Commissioners, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years. It is held that this enactment absolutely prohibits any disposition of charity lands in contravention of the restrictions thereby imposed (*x*); and any such disposition is altogether void (*y*). And it has been held that the expressions in the Act authorising alienation under a scheme legally established relate only to schemes for the administration of charities made under the jurisdiction in that behalf inherited by the High Court from the Court of Chancery or conferred by the Charitable Trusts Acts (*z*); so that the trustees of charities are no longer at liberty to exercise express powers of alienation conferred on them by the author of the trust, except in accordance with the restrictions of the Act of 1855 (*a*). The word "charity" in this Act includes every institution in England or Wales endowed for charitable purposes, but not any charity or institution expressly exempted from the operation of the Charitable Trusts Act, 1853; and the Act of 1855 does not extend to any case excepted by sect. 62 of the Act of 1853 from the operation thereof (*b*). These exceptions are stated in the note (*c*), and regard must of

(*x*) *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596; *Fell v. Official Trustee of Charity Lands*, 1898, 2 Ch. 44.

(*y*) *Bangor v. Parry*, 1891, 2 Q. B. 277.

(*z*) See *Tudor's Charitable Trusts*, 3, 181 *sq.*, 184 *sq.*, 195 *sq.*, 593, 596 *sq.*, 4th ed.; stats. 16 & 17

Vict. c. 137, ss. 28, 29, 32, 43; 23 & 24 Vict. c. 136, s. 2.

(*a*) *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596; *A.-G. v. National Epileptic Hospital*, 1904, 2 Ch. 252; *A.-G. v. Mathieson*, 1907, 2 Ch. 383.

(*b*) Stat. 18 & 19 Vict. c. 124, ss. 47, 48.

(*c*) By sect. 62 of the Charitable Trusts Act, 1853, this Act shall not extend to—

(1) The Universities of Oxford, Cambridge, London or Durham, or

course be had to them in advising on the title to any land sold by charity trustees.

- any college or hall in the said Universities of Oxford, Cambridge and Durham; or to
- (2) Any cathedral or collegiate church (see *Re Dod's Charity*, 1905, 1 Ch. 442); or to
 - (3) Any building registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths or Marriages in England or Wales, and *bonâ fide* used as a place of meeting for religious worship (see stats. 18 & 19 Vict. c. 81, s. 9; 32 & 33 Vict. c. 110, s. 15); or to
 - (4) The Commissioners of Queen Anne's Bounty; or to
 - (5) The British Museum; or to
 - (6) Any friendly or benefit society or savings bank; or to
 - (7) Any institution, establishment, or society for religious or other charitable purposes, or the auxiliary or branch associations connected therewith, *wholly maintained by voluntary contributions*; or to
 - (8) Any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and
 - (9) Where any charity is *maintained partly by voluntary subscriptions and partly by income arising from any endowment*, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the Board of Charity Commissioners or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act; and
 - (10) Nothing in this Act shall subject the funds or property of any missionary or other similar society, or the missionaries, teachers, or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales, to the jurisdiction of the said Board:

Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools. See also sect. 66.

Dispositions
of charity
lands by
authority of
the Charity
Commis-
sioners.

Under the Charitable Trusts Act, 1853 (*d*), the Charity Commissioners may authorise the sale, exchange, mortgage (*e*), or leasing of charity lands, where advantageous to the charity; and leases, sales, exchanges, and other transactions so authorised shall have the like effect and validity as if they had been authorised by the express terms of the trust affecting the charity (*f*). Thus, where express powers of alienation have not been conferred on the trustees of charity lands, the Charity

It has been held that, by charities wholly maintained by voluntary contributions, it is intended to describe charities which have no invested endowment yielding an income for their support, or other property permanently available for the purposes of the charity (as freehold land owned and occupied for such purposes), but are entirely dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will; *A.-G. v. Mathieson*, 1907, 2 Ch. 383. With regard to charities maintained partly by voluntary subscriptions and partly by income arising from any endowment, it has been held that the income of any endowment *primâ facie* means income derived from any invested funds; that in the case of such charities, bequests and donations for the general purposes of the charity, which may be lawfully applied as income consistently with the terms of the gift, are exempt from the operation of the Acts; and that, so long as they remain so applicable as income, such gifts and the income thereof are not brought within the operation of the Acts by being invested, even in the purchase of land. So that in the case of the last-mentioned charities, land bought by the trustees with the produce of such gifts can be disposed of without the consent of the Charity Commissioners, and, further, appears to be alienable by the trustees at their discretion without subjecting the purchaser to the burden of proving that the alienation was beneficial to the charity; above, p. 459, n. (*u*); see *Re Clergy Orphan Corporation*, 1894, 3 Ch. 145, 150, 154; *Royal Society of London and Thompson*, 17 Ch. D. 407; *Finnis and Young to Forbes and Pochin*, 24 Ch. D. 587, 591; *Re Gilchrist Educational Trust*, 1895, 1 Ch. 367; *Re Stockport, &c. Schools*, 1898, 2 Ch. 687; *Re Church Army*, 1906, W. N. 73; 94 L. T. 559; *A.-G. v. Mathieson*, 1907, 2 Ch. 383, 393; *Re Society for training Teachers of the Deaf and Whittle's Contract*, ib. 486; *Re Wesleyan Methodist Chapel, South Street, Wandsworth*, 1909, 1 Ch. 484; see also *Corporation of Sons of Clergy and Skinner*, 1893, 1 Ch. 178; *sed quære* whether this case is consistent with *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596. If however any land so purchased be by deed or otherwise so settled or appropriated to some particular charitable purposes that it is no longer competent for the governing body of the charity to apply the proceeds of a sale thereof as income, it will become an endowment and be subject to the jurisdiction and control of the Charity Commissioners; *A.-G. v. Mathieson*, *ubi sup.*

(*d*) Stat. 16 & 17 Vict. c. 137, c. 124, s. 30; 23 & 24 Vict. c. 136, ss. 21, 24. s. 15.

(*e*) See also stats. 18 & 19 Vict.

(*f*) Stat. 16 & 17 Vict. c. 137, s. 26.

Commissioners may authorise provident dispositions thereof (*g*); and where such express powers have been conferred, the approval of the Charity Commissioners is generally necessary to their exercise (*h*). Where the title to any land sold depends on any disposition of charity lands, to which the authority or approval of the Charity Commissioners is necessary, the order of the Commissioners giving such authority or approval should be abstracted and produced; and if this be not done, the order should be inquired for, and in default of the production of such an order, objection should be taken to the title. The order of the Charity Commissioners authorising a disposition of charity lands does not of course operate as a conveyance of the legal estate therein; that must be duly assured in order to give effect to the disposition authorised (*i*). Such assurance may be made either by the person or all the persons seised of the legal estate, or else under sect. 12 of the Charitable Trusts Act, 1869 (*k*), providing that, where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, acts and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect, and all such

Assurance of
the legal
estate in
charity lands.

(*g*) The jurisdiction of the High Court to authorise such dispositions (above, p. 459, n. (*u*)) remains; but under the Charitable Trusts Act, 1853, no application can be made to the Court for such purpose without the certificate of the Charity Commissioners: stat. 16 & 17 Vict. c. 137, s. 17.

(*h*) Above, pp. 459, 460.

(*i*) Mortgagees of charity lands, however, are generally satisfied with the provision for repayment made by the Charity Commissioners' Order: see Tudor's Charitable Trusts, 528, 4th ed.

(*k*) Stat. 32 & 33 Vict. c. 110.

assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being and by the official trustee of charity lands. This section appears to be applicable where the power of determining on a sale or other disposition of the charity lands has been conferred on the trustees by order of the Charity Commissioners; and it enables the majority of the trustees to convey the legal estate in the land, whether the same be vested in the whole number of trustees or in the official trustee of charity lands (*l*). But where the title to any land sold depends on an assurance executed under this section, proof must be given that the persons who executed the same were the majority of those present at a meeting of their body duly constituted and voting on the question (*m*). As the Charitable Trusts Act, 1869 (*n*), is to be construed as one with the Charitable Trusts Acts, 1853 and 1855, it does not appear to apply in cases excepted from the operation of these Acts (*o*). In such cases, therefore, all persons seised of the legal estate in the charity lands must concur in executing any assurance thereof. Where any land sold has been held by a succession of charity trustees, of course the appointments of any new trustee and the conveyances consequent on such appointment form part of the title, and must be abstracted and produced accordingly. Under the Trustees Appointment Acts, 1850 to 1890 (*p*), lands held in trust for certain religious or educational purposes vest in new trustees duly appointed, or in such new trustees together with the continuing trustees, without any express conveyance for the purpose.

(*l*) See stats. 16 & 17 Vict. c. 137, ss. 47—50; 18 & 19 Vict. c. 124, s. 15.

(*m*) 1 Dart, V. & P. 288, 289, 5th ed.; 329, 6th ed.; 325, 7th ed.

(*n*) Stat. 32 & 33 Vict. c. 110, s. 3.

(*o*) Above, p. 460, and n. (*c*).

(*p*) Stats. 13 & 14 Vict. c. 28; 32 & 33 Vict. c. 26; 53 & 54 Vict. c. 19.

Under the Board of Education Act, 1899 (*q*), and the Orders in Council made thereunder (*r*), all the powers conferred on the Charity Commissioners by the enactments above mentioned (*s*) were, so far as those powers relate to endowments held solely for educational purposes, transferred to the Board of Education.

Board of Education substituted for Charity Commissioners as to endowments held solely for educational purposes.

§ 8.—*Partnership Property.*

Where a purchaser has notice that any land sold is or has been partnership property, he must ascertain that the same has been or shall be duly assured, not only by all persons seised of the legal estate therein, but also by all persons interested therein in equity under the agreement of partnership (*t*). As is well known, when any land becomes partnership property, the legal estate therein devolves according to the general law applicable to land of the like nature and tenure: but in equity the land is held in trust for the partners, who are entitled thereto, as between themselves and their representatives, as personal estate (*u*). The devolution at law of real estate, which is partnership property, varies, of course, according as it has been dealt with. It may have been conveyed to the partners or some of them only, as joint tenants in fee or as tenants in common, or to one partner only in fee, or it may have been vested in trustees, none of whom were partners. But in whatever form the

Partnership property.

(*q*) Stat. 62 & 63 Vict. c. 33, s. 2 (2).

(*r*) See orders of 7th Aug. 1900, 24th July, 1901, 11th Aug. 1902; Tudor's Charitable Trusts, 760—769, 4th ed.

(*s*) Above, pp. 455, 460—464.

(*t*) See *Carandere v. Bullock*, L.R. 9 Ch. 79, where the defendants, having taken from one Bowlay a mortgage of land, of which at law he was solely seised in fee, but which in equity belonged to

him and the plaintiff as partners, were held to have had constructive notice of the firm's title, because they were aware that the business of the firm was carried on there. And see above, pp. 237 *sq.*

(*u*) See stat. 53 & 54 Vict. c. 39, ss. 20—22; *Darby v. Darby*, 3 Drew. 495; *Waterer v. Waterer*, L.R. 15 Eq. 402; *A.-G. v. Hambrook*, 13 Q. B. D. 275; *Re Bourne*, 1906, 2 Ch. 427, 429, 432, 433.

conveyance was taken, the subsequent devolution of the legal estate is to be traced according to the general rules governing the devolution of real estate held upon trust (*x*). Prior to the year 1882, therefore, if a person (whether a partner or not) were solely seised in fee of land held in equity as partnership property, the legal estate passed, on his death, to his heir or devisee: but the heir or devisee was held to be a trustee for the persons entitled under the partnership agreement (*y*). Since the end of the year 1881, it appears that, in the same circumstances, the legal estate passes to the deceased tenant's personal representatives under the Conveyancing Act of 1881 (*z*). As regards the persons, who should

(*x*) Land, which is partnership property, is in effect held upon trust for sale and conversion into money and application of the proceeds of the sale, first, in discharging the partnership liabilities and subject thereto in dividing the same between the partners in proportion to their interests: *Darby v. Darby*, 3

Drew. 495; *A.-G. v. Hubbuck*, 10 Q. B. D. 488, 13 Q. B. D. 275, 289; stat. 53 & 54 Vict. c. 39, ss. 20 (2), 22, 44; *Re Bourne*, 1906, 2 Ch. 427, 432, 433.

(*y*) *Broom v. Broom*, 3 My. & K. 443; *West of England, &c. Bank v. Murch*, 23 Ch. D. 138; above, p. 219.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 221. It is submitted that the cases cited in the two preceding notes establish that the estate, even when vested in a partner or in all the partners, is held upon a trust within the meaning of this enactment. Where land has been vested in partners as joint tenants in fee, but as part of their partnership estate (see 1 Key & Elph. Prec. Conv. 438, 4th ed.; 436, 8th ed.), or as tenants in common in equal shares, the case of *Re Selous*, 1901, 1 Ch. 921, may perhaps be thought to raise a doubt whether the partners can have different interests in the land in equity from what they have at law. In that case, one who was a trustee of leaseholds for two ladies in equal shares, by deed reciting that they had requested him to execute to them such assignment thereof as was thereafter expressed, assigned the same to them as joint tenants, and they jointly covenanted to indemnify him against the rent and lessee's covenants. On the death of one of the ladies her executors claimed her share on the ground that in equity the ladies had remained tenants in common. Farwell, J., decided against this claim, holding that the case came within the rule in *Selby v. Alston*, 3 Ves. 339, that where equitable and legal estates, equal and co-extensive, unite in the same person, the former merges, or in other words, that a person cannot be a trustee for himself. He said: "The only doubt I felt was whether the advantage of a tenancy in common over a joint tenancy raised any presumption against merger. But the difference in interest between these two estates is so small and shadowy that I do not think it would be sufficient to raise that presumption. I hold that two or more persons cannot be trustees for themselves for an estate

concur in a disposition of land, which is partnership property, as being entitled under the partnership agree-

co-extensive with their legal estate." It is respectfully submitted that the learned judge rightly rejected the executors' claim, but for the wrong reasons. The deed of assignment was a conveyance by a trustee under a simple trust, who had been requested by his *cestui que trusts* to execute the estate to them. In such conveyance the limitation of the estate was expressly made to the *cestui que trusts* as joint tenants at their own request; their intention to take as such was plainly evidenced by the deed which they executed themselves. Why, then, should there be any equity to preserve their estate in common contrary to their expressed intention? (See *Fowkes v. Pascoe*, L. R. 10 Ch. 343.) Suppose, however, that they had taken the assignment to themselves jointly on trust as to one moiety for the one and as to the other moiety for the other, or, which is the same thing, on trust for themselves as tenants in common in equal shares. Would the Court then have rejected the executors' claim? I think not. It is respectfully submitted that the learned Judge's *dictum* as to the difference between joint tenancy and tenancy in common being small and shadowy was an incautious utterance. There is nothing to prevent a man from being a trustee for himself and others, or from being one of several trustees for himself. If lands are conveyed to the use of A. and B. in fee as joint tenants on trust for them in fee in equal shares, each undivided moiety is, in equity, held by a several title: see Litt. s. 292. At law A. and B. are joint tenants in fee; each is therefore seised of the whole. But in equity A. and B. have no interest in each other's shares; each has a several title to one half only. In all except unity of possession the case is the same as if two separate pieces of land had been assured to the use of A. and B. in fee on trust, as to one for A. in fee, and as to the other for B. in fee. How, then, can it possibly be maintained that their estates in equity are co-extensive and commensurate with their estates in law? And where the equitable estate is not commensurate with the legal estate in the same person, there is no merger: see *Brydges v. Brydges*, 3 Ves. 120, which was not cited in *Re Selous*. The rule in *Selby v. Alston* has never been supposed to apply to land assured to the use of partners in fee as part of their partnership estate; and the case of *Re Selous* certainly affords no good reason why the construction previously placed on such assurances should be in any way disturbed. The interest which the partners take in equity by reason of their interest in the partnership is altogether different from that which they have by reason of their tenancy at law: see note (c) above. And it is contrary to the principles of equity that an equitable interest in any property, which interest has become vested in the legal or equitable owner of the property, but is not of exactly the same nature as his ownership, shall merge in the ownership if it were not intended that such merger should take place: see *Forbes v. Moffatt*, 18 Ves. 381; *Adams v. Angell*, 5 Ch. D. 634; *Re Pride*, 1891, 2 Ch. 135; *Minter v. Carr*, 1894, 3 Ch. 498; *Thorne v. Cann*, 1895, A. C. 11; *Ingle v. Vaughan Jenkins*, 1900, 2 Ch. 368; *Thellusson v. Liddard*, ib. 635. The cases of *Re Wray*, 1905, 2 Ch. 349, 352, *Re Bourne*, 1906, 2 Ch. 427, 432, 433, and *Re Kent County Gas, &c. Co., Ltd.*, 1909, 2 Ch. 195, show clearly that, where real estate is vested in partners as joint tenants, their beneficial interests therein are personalty in equity, and are according to their interests in the partnership property.

ment, it is to be observed, first, that one partner has no general authority arising from the relation of partnership to bind the firm or the other partners by deed or to execute a deed on their behalf (*a*); and, secondly, that one partner may, it seems, make an equitable mortgage of the firm's land to secure the firm's debt (*b*); but, except where the ordinary business of the firm is to sell land (*c*), he has no general authority arising out of the relation of partnership to sell the firm's land (*d*). All dispositions, therefore, required by law to be made by deed of a partnership firm's estate or interest in any land must be executed by all the partners either personally or by attorney acting under an express power of attorney given by deed; and except in the case of an equitable mortgage to secure the firm's debt or a sale or lease by a firm whose ordinary business it is to sell or let land, all dispositions of the firm's equitable interest in any land, which is partnership property, must be made by all the partners; as, for instance, a contract for the sale or letting of the land where the business is carried on. After the dissolution of a partnership, whether by death or otherwise, the authority of each partner to bind the firm continues, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise: provided that the firm is in no case bound by the acts of a partner who has become bankrupt (*e*). It has been held that the survivor of two partners may make a good equitable mortgage by

(*a*) *Harrison v. Jackson*, 7 T. R. 207; *Steiglitz v. Egginton*, Holt, 141; *Marchant v. Morton*, 1901, 2 K. B. 829, 832.

(*b*) See *Re Clough*, 31 Ch. D. 324; *Lindley on Partnership*, 166, 7th ed.; *Pollock on Partnership*, 35, 8th ed.

(*c*) See stat. 53 & 54 Vict. c. 39, ss. 5, 6.

(*d*) See *Butchart v. Dresser*, 10 Hare, 453, 456, 4 De G. M. & G. 542.

(*e*) Stat. 53 & 54 Vict. c. 39, s. 38.

deposit of the title deeds of the firm's land to secure a firm debt (*f*), and that such a mortgage has priority over any lien of the deceased partner's executors on the surplus assets for his share in the partnership (*g*). And it has been laid down by the Court of Appeal that, on the dissolution of a partnership by the death of one of two partners, it is the duty of the surviving partner to realise all the assets of the firm, including its real estate, for the purpose of winding up the partnership affairs, and the surviving partner has for this purpose full power, not only to mortgage, but also to sell such real estate (*h*). Having regard to this pronouncement, it appears that, where the survivor of two partners sells the real estate sufficiently soon after the other partner's death to make it apparent that he is selling to wind up the partnership affairs, he can make a good title to the equitable interest (*i*) in the land and give a good discharge for the purchase money without the concurrence of the deceased partner's legal personal representatives. And it is thought that this rule applies to partnerships entered into under an open contract (where the assets belong in equity to the surviving partner and the dead partner's personal representatives in equal shares), and to those under which the surviving partner is given an option to take over at a valuation the deceased partner's share of the assets of the firm (*k*), as well as to partnerships regulated by a stipulation that the surviving

Power of surviving partner to sell or mortgage the firm's lands.

(*f*) *Re Clough*, 31 Ch. D. 321.

(*g*) *Re Bourne*, 1906, 2 Ch. 427.

(*h*) *S. C.*, 1906, 2 Ch. 430—433.

(*i*) The title to the legal estate depends of course on the manner in which it was held on trust for the firm; see above, p. 465. If the land had been vested at law in the two partners as joint tenants in fee, the surviving partner alone could convey the entire legal estate.

(*k*) See Davidson, *Proc. Conv.* vol. 5, pt. ii. p. 355, 3rd ed. Such options must be exercised precisely according to their terms; *Tyse v. Foster*, 7 H. L. 318, 329: but it is thought that, if so exercised, they relate back to the time of their creation and amount to absolute contracts, deriving their effect from the articles of partnership, to purchase the deceased partner's share.

partner shall take over the dead partner's share at a valuation payable by instalments (*l*). But where a surviving partner has continued to carry on the business of the firm and remained in possession of land, which belonged to the firm, for a long time after the dissolution of the partnership and then sells the land, it is thought that he would have to prove, as part of his title, that he purchased the deceased partner's share of the assets of the firm from the dead man's personal representatives, either under a contract to that effect contained in the articles of partnership or otherwise, and that the purchase money therefor has all been duly paid.

§ 9.—*Sale by Order of the Court.*

Title under an order for sale made by the Court.

Where the title to any land sold depends on an order for sale made by the Court (*m*), the principal points, on which the purchaser's advisers must satisfy themselves, are these: first, that the whole legal estate in the land

(*l*) The effect of such a stipulation is that, on the death of a partner the entire property in all the assets (including any real estate) belonging to the firm passes at once in equity to the surviving member of the firm; *Vyse v. Foster*, L. R. 8 Ch. 309, 328, 7 H. L. 318, 330, 334, 335, 341, 345; *Hordern v. Hordern*, 1910, A. C. 465, 473; and that the surviving partner has authority, for the purpose of winding-up the affairs of the partnership, to sell or mortgage such assets free from any lien of the personal representatives of the dead partner for the amount so payable to them; see *Re Langmead's Trusts*, 20 Beav. 20, 7 De G. M. & G. 353; *Re Bourne*, 1906, 2 Ch. 427. In *Re Bourne* the partnership contract contained such a stipulation (see 1906, 1 Ch. 113): but the case was decided on the footing of its being a partnership

under an open contract, and the judgments delivered apply to a partnership of that kind. Before this decision, it was the practice of conveyancers, on the sale of partnership land by the surviving partner under an open contract of partnership, to require the personal representatives of the dead partner to concur in the conveyance and give a receipt for their share of the purchase money; see *Butchart v. Dresser*, 10 Hare, 453, 456, 4 De G. M. & G. 542, 544; *West of England, &c. Bank v. Murch*, 23 Ch. D. 138; 50 Sol. J. 307 (by the writer).

(*m*) As to sales of land by the Court, see 2 Dart, V. & P. 1190 *sq.*, 5th ed.; 1313 *sq.*, 6th ed.; 1151 *sq.*, 7th ed.; 1 Dan. Ch. Pr. 872 *sq.*, 7th ed.; 1 Seton on Judgments, 333 *sq.*, 338, 6th ed.; 1 Davidson, Prec. Conv. 499 *sq.*, 5th ed.

has been conveyed to the person asserting title under the order, or will be conveyed to the purchaser, either by the assurance of all persons interested therein or by vesting order; secondly, that the order for sale was duly made and properly carried out, or if not, that the defect is one which may be disregarded in reliance on sect. 70 of the Conveyancing Act of 1881 (*n*); and thirdly, that all persons interested in the property sold for any equitable estate or interest were or are either parties to or otherwise bound by the proceedings in which the order for sale was made; or if not, that all estates or interests of all persons not so bound have been or will be expressly assured to the person asserting title under the order or to the purchaser. The jurisdiction of the High Court of Justice to order a sale of land (*o*) is either derived from the general equitable or

Jurisdiction
of the Court
to order a
sale of land.

(*n*) Stat. 44 & 45 Vict. c. 41.

(*o*) The original jurisdiction of the Court of Chancery to order a sale of land appears to have been confined to cases where such a sale was necessary in order to satisfy creditors' claims enforceable against the land in that Court, or where a trust for sale of the land had been created and was exercisable: *Lechmere v. Brasier*, 2 J. & W. 287; *Calvert v. Godfrey*, 6 Beav. 97; *Carlyon v. Truscott*, L. R. 20 Eq. 348; *Re Staines*, 33 Ch. D. 172. Thus in suits for the administration of the estates of deceased persons the Court might order a sale of chattels real, and might, if there was jurisdiction to administer the real estate, either by reason of the same having been charged with the payment of debts or under stat. 3 & 4 Will. IV. c. 104, order a sale of real estate. The Court might also order a sale of land in a suit to enforce an equitable lien in the nature of an equitable mortgage of land, as in the case of a vendor's lien for unpaid purchase money: *Mackreth v. Symmons*, 15 Ves. 329; *Neate v. Marlborough*, 3 My. & Cr. 407, 417; *Governors of Greycoat Hospital v. Westminster Improvement Commrs.*, 1 De G. & J. 531; *Skene v. Cook*, 1902, 1 K. B. 682, 688, 689; *Seton on Judgments*, 2054, 6th ed. And lands forming part of the assets of a partnership firm might be ordered to be sold under the general jurisdiction of the Court to order the sale of the firm's property on a dissolution of partnership: *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Duchy v. Duchy*, 3 Drew. 495; *Taylor v. Neate*, 39 Ch. D. 538. The principal statutory jurisdiction of the High Court of Justice to order a sale of land is the following:—(1) That conferred by sect. 25 of the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41) to order a sale in redemption or foreclosure actions. This was new as to redemption actions, while as to foreclosure actions it replaced and extended the jurisdiction given by sect. 48 of the Chancery Procedure Act, 1852 (stat. 15 & 16 Vict. c. 86). (2) That conferred by the Partition Acts, 1868 and 1876 (stats. 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17).

What interests are bound by an order for sale.

the statutory jurisdiction of the Court of Chancery transferred by the Judicature Acts to the High Court of Justice and for the most part exercisable in the Chancery Division (*p*), or else has been expressly conferred on the High Court since the Judicature Acts, so that such orders have been made in the past either by the Court of Chancery or by the High Court acting as a Court of Equity. When such an order is made, it binds the equitable interests in the land sold of all persons, who are either parties to or bound by the proceedings in which the order is made (*q*). There is therefore no need, when land is sold in pursuance of such an order, for any such persons to join in the conveyance to the purchaser; and where there are no other equitable interests existing in the property sold, all that is necessary is that the legal estate should be duly conveyed to him (*r*). But an order for the sale of any land does not affect either the legal or the equitable interests therein of any persons who are neither parties to nor bound by the proceedings in which the order was made; so that if any such interests should be outstanding, a good title is not made (*s*). As a rule, a purchaser of

(3) That conferred by the Settled Estates Act, 1877, replacing a similar Act of 1856 (stats. 40 & 41 Vict. c. 18; 19 & 20 Vict. c. 120).

(4) That conferred by the Confirmation of Sales Act, 1862 (stat. 25 & 26 Vict. c. 108). (5) That conferred by the Judgments Act, 1864, enabling the Court to order the sale of a judgment debtor's interest in land taken in execution by a judgment creditor. This superseded the former proceedings under the Judgments Act, 1838, to realise the charge given by that Act (see stats. 27 & 28 Vict. c. 112, s. 4; 1 & 2 Vict. c. 110, s. 13; Wms. Real Prop. 275, 21st ed.).

(6) That conferred by R. S. C., Nov. 1893, r. 18 (Ord. L.I. r. 1B), to order a sale in debenture holders' actions: and see R. S. C. 1883, Ord. L.I. r. 1, which has been held not to extend the jurisdiction of the Court so as to enable it to make an order for sale of real estate, where none could have been made before: *Re Robinson*, 31 Ch. D. 247.

(*p*) Stats. 36 & 37 Vict. c. 66, ss. 16, 34; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77; Wms. Real Prop. 167, 21st ed.

(*q*) *Cole v. Sorell*, 17 Sim. 40; *Re Williams*, 5 De G. & S. 515; *Basnett v. Moxon*, L. R. 20 Eq. 182, 184.

(*r*) 2 Hayes's Conveyancing, 104, n.; Davidson, Prec. Conv. vol. ii. pt. i. 270, n. (*a*), 283, n. (*b*), 4th ed.

(*s*) See *Craddock v. Piper*, 14 Sim. 310, 312; *Goers. of Greycoat Hospital v. Westminster Improvement Commrs.*, 1 De G. & J. 531;

land under an order for sale made by the Court is entitled to require that the legal estate shall be duly conveyed to him (*t*): though the Court of Chancery, in the old days before power had been given by statute to dispose of estates vested in infants as trustees (*u*), would oblige a purchaser under a decree for sale of lands vested at law in an infant to accept the equitable title conferred by the order only, as the purchaser had notice from the record of the infancy, and therefore of the impossibility of conveyance before the infant attained full age (*x*). The occasion for this exception was removed by statutes of Will. IV. (*y*); and by the Trustee Acts, 1850 and 1852 (*z*), now replaced by the Trustee Act, 1893 (*a*), power was given to the Court, where a complete assurance of the whole legal estate in any lands sold under its order could not be obtained by reason of the disability of some person interested therein or for other causes, of effecting the conveyance of the legal estate by an order vesting the same in the purchaser. Since this jurisdiction was conferred, it has been the regular practice to resort thereto (*b*); and where lands have been sold under an order of the Court and any *legal* estate or interest therein cannot be well assured by the person entitled thereto, whether by reason of his disability or of the same having been limited to some unborn or unascer-

What estates the purchaser should require to be conveyed to him.

Knight v. Twick, 24 Beav. 436; *Freeland v. Pearson*, L. R. 7 Eq. 246; *Jones v. Burnett*, 1899, 1 Ch. 611, 1900, 1 Ch. 370.

(*t*) *Noel v. Weston*, G. Coop. 138; *Morris v. Clarkson*, 3 Swanst. 558, 564; Sug. V. & P. 397, 398; *Freeland v. Pearson*, L. R. 7 Eq. 246.

(*u*) See stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; Sug. V. & P. 397, 398.

(*x*) *Wultham's case*, cited G. Coop. 139, Sug. V. & P. 397; *Morris v. Clarkson*, 3 Swanst. 558.

(*y*) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11, and c. 60, s. 7.

(*z*) Stats. 13 & 14 Vict. c. 60, s. 29; 15 & 16 Vict. c. 55, s. 1.

(*a*) Stat. 56 & 57 Vict. c. 53, s. 30; see also sects. 26-29, 31-33, 50; and see as to the orders made and practice thereunder, 2 Seton on Judgments, 1261 *sq.*, 6th ed.

(*b*) 2 Dart. V. & P. 1220, and n. *q*, 5th ed.; 1347, and n. (*k*), 6th ed.; 1184, and n. (*s*), 7th ed.

tained person or persons, the purchaser's title will not be complete unless an order vesting the same in him has been duly obtained (*c*). As regards the assurance to the purchaser of lands sold under an order of the Court of the equitable estate therein, we have seen (*d*) that the order for sale binds the equitable interests of all persons who are parties to or otherwise bound by the proceedings in which the order was made, and there is no need for any other assurance of such interests to be made. So that where any *equitable* estate has been limited to any unborn or unascertained person, there is no occasion to obtain an order expressly vesting the same in the purchaser; the order for sale is sufficient for this purpose. But in order to bind the equitable interests of persons intended to be bound by the proceedings, it was formerly necessary that the order for sale should be *duly* made, that is, made on a right exercise of some jurisdiction in that behalf (*e*) vested in the Court; and if this were not the case, the Court would not oblige the purchaser, if he took the objection, to accept the title, and if he did accept the title, it appears that he would not have been protected by the order (*f*). And the same result would follow, if the sale were not properly carried out according to the order, although the order itself were valid (*g*). Other irregularities in the proceedings, in which the order for sale was made, would not, as a rule, affect a purchaser under the order (*h*). But, as the order did

The order
should have
been rightly
made—

And the sale
properly
carried out.

(*c*) See *Wake v. Wake*, 17 Jur. 545; *Wood v. Beettleson*, 1 K. & J. 213; *Lees v. Coulton*, L. R. 20 Eq. 20; *Basnett v. Moxon*, ib. 182; Seton on Judgments, 1261, 1262, 6th ed.

(*d*) Above, p. 472.

(*e*) Above, p. 471, n. (*a*).

(*f*) *Lechmere v. Brasier*, 2 J. & W. 287; *Blacklow v. Laws*, 2 Hare, 40; *Calvert v. Godfrey*, 6 Beav. 97; 2 Dart, V. & P. 1224,

5th ed.; 1351, 6th ed.; 1186, 7th ed.

(*g*) *Colebrough v. Sternin*, 3 Bligh, 181; *Powell v. Powell*, L. R. 10 Ch. 130.

(*h*) See *Lutwyche v. Winford*, 2 Bro. C. C. 248; *Lloyd v. Johnes*, 9 Ves. 37, 65; *Curtis v. Price*, 12 Ves. 89; *Bowen v. Evans*, 2 H. L. C. 257; *Beidley v. Carter*, L. R. 4 Ch. 230, 238; Sug. V. & P. 110; 2 Dart, V. & P. 1223—1225, 5th ed.; 1350—1352, 6th ed.; 1185—1187, 7th ed.

not affect the interests, whether legal or equitable, of any persons who were neither parties to nor otherwise bound by the proceedings, it was always necessary for the purchaser to see that all persons interested in the property sold were so bound, or else that he would obtain an express conveyance from them of their respective interests (*i*). By the Conveyancing Act of 1881 (*k*) an order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not. The *dicta*, if not the decisions, upon the construction of this enactment have been somewhat conflicting (*l*); and it is not easy to state its precise effect. But it is to be observed that it purports to cure one defect of title only, the invalidity of an order of the Court, whether for sale or otherwise; and that it does not appear to extend the effect of a valid order so as to bind any persons whose interests would not otherwise have been affected thereby (*m*). The enactment appears to protect purchasers from disturbance by persons who might otherwise have ejected them or recovered against them on the ground that an order of the Court forming part of their title was invalid for want of jurisdiction or for any other cause therein mentioned. And it has been held

Order of the Court not to be invalidated for want of jurisdiction.

(*i*) *Coleclough v. Steam*, 3 Bligh. 181, 186; *Bischoff v. Carter*, L. R. 4 Ch. 230, 238; Sug. V. & P. 111; 2 Dart, V. & P. 1225, 5th ed.; 1352, 6th ed.; 1187, 7th ed.; and see above, p. 172, and note (*s*).

(*k*) Stat. 44 & 45 Vict. c. 41, s. 70, sub-s. 1, extending by sub-s. 3 to past as well as future orders, except those which had been already held to be invalid, or to invalidate which proceedings were pending; and declared by sub-s. 2 to have effect as to leases, sales or other acts autho-

rised by the Court under the Settled Estates Act, 1877, or the Act of 1856, notwithstanding the exceptions therein mentioned: see stats. 19 & 20 Vict. c. 120, s. 28; 40 & 41 Vict. c. 18, s. 40.

(*l*) See *Re Hall Darn's Contract*, 21 Ch. D. 41; *Mostyn v. Mostyn*, 1893, 3 Ch. 376; *Jones v. Barnett*, 1899, 1 Ch. 611, 1900, 1 Ch. 370.

(*m*) It is submitted that any *dicta* to the contrary effect in *Mostyn v. Mostyn* (ubi sup.) are erroneous; see *Jones v. Barnett*, ubi sup.

that purchasers of land under an order for sale made by the Court are no longer at liberty to object to the title on the ground that the order is invalid for any of such causes (*n*). But the enactment does not protect a purchaser from disturbance by persons whose rights or interests were never intended to be affected by the order; it has not the effect of conferring on a purchaser under an order for sale a good title as against all the world (*o*). And where the order, being valid, is not properly carried out, the enactment does not appear to have any application. The duties of the conveyancer advising a purchaser of land, to which the title depends upon an order for sale made by the Court, remain, therefore, as above stated (*p*).

§ 10.—*Sale of an Equity of Redemption.*

Risks incurred on purchase of an equity of redemption.

The purchaser of an equity of redemption is exposed to the following risks:—First, since equitable charges or rights affecting equitable estates in land rank, as a rule, according to the order of the times at which they were created (*q*), he takes subject to all equities affecting the land purchased in the hands of the vendor at the time of sale, whether he have notice of any such equities or not. He buys, therefore, subject to all prior equitable mortgages of the land, whether made in favour of the legal mortgagee on further advances or of any other person (*r*), to any right of consolidation of securities which the mortgagee may have already acquired (*s*),

(*n*) *Re Hull Dore's Contract*, 21 Ch. D. 41.

(*o*) *Jones v. Barnett*, 1899, 1 Ch. 611, 1900, 1 Ch. 370.

(*p*) Pp. 470, 471.

(*q*) *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14; *Phillips v. Phillips*, 4 De G. F. & J. 208, 215; *Taylor v. London and County Bank*, 1901, 2 Ch. 231, 260; *Perham v. Kempster*, 1907, 1 Ch. 373, 379.

(*r*) See previous note, and *Bailey v. Richardson*, 9 Hare, 734; *Taylor v. Russell*, 1892, A. C. 244, where the prior equitable mortgage was only excluded by tacking.

(*s*) See *White v. Hillaire*, 3 Y. & C. Ex. 597, 608, 609; *Jennings v. Jordan*, 6 App. Cas. 698; *Harter v. Colman*, 19 Ch. D. 630; *Minter v. Carr*, 1894, 3 Ch. 498. These cases establish that, if no

and to all other equities affecting the premises, such as any equitable right to set aside the conveyance to the vendor (*t*), or any claims on the premises arising from any trust to which the same may have been subject in the vendor's hands (*u*). And after completion of the contract by conveyance and payment of the purchase money, he remains subject to such of these prior equities as amount to an *interest* in the land, in distinction to a bare right of suit (*x*). Secondly, in consequence of the doctrine of tacking equitable charges to the legal estate, the purchaser of an equity of redemption incurs the danger of being excluded by or postponed to equitable charges on the land made subsequently to the sale. Thus, if the legal mortgagee were to make further advances to the vendor after the sale, but whilst the vendor remained in possession or otherwise in apparent ownership of the land, and without having received notice of the sale, he would be entitled to tack all that might become due in respect of such advances to his original charge (*y*). And any other person who should make advances to the vendor on the security of the land after the sale and in the same circumstances,

Through
tacking.

right of consolidation should have been acquired prior to the sale of the equity of redemption, it cannot afterwards arise by reason of the mortgage and some security on other property of the mortgagor becoming subsequently vested in the same person, and absolute at law. But if a man buy from the same mortgagor, and at the same time, the equity of redemption of several properties subject to different mortgages, he takes them subject to any right of consolidation which may subsequently arise: *Foot v. Padget*, 2 De G. & J. 611; *Pledge v. White*, 1896, A. C. 187; and see *Wms Real Prop.* 575—577, 21st ed.

(*t*) See *Bailey v. Barnes*, 1894, 1 Ch. 25, where the prior equitable

right was only defeated by tacking.

(*u*) See *Bates v. Johnson*, Joh. 304, where the claim of the *cestui que trust* was only defeated by tacking: *Care v. Care*, 15 Ch. D. 639; *Taylor v. London and County Bank*, 1901, 2 Ch. 231.

(*x*) See *Care v. Care*, 15 Ch. D. 639, 645—649. To a bare right of suit in equity, such as a claim to set aside a conveyance for fraud, he could, after payment of the price, plead purchase for value without notice of the equity: see *S. C.*; below, Chap. XIII. § 1; Chap. XIV. § 1.

(*y*) *James v. Paolles*, 3 My. & K. 581; *Sug. V. & P.* 196; *Young v. Young*, L. R. 3 Eq. 801.

Inquiries to be made by purchaser of an equity of redemption.

might, if he could obtain a transfer of the legal mortgage, tack what should be due under such subsequent advances to the original mortgage debt (z). The purchaser of an equity of redemption may guard against some of these risks, but against others he has no protection. Thus he may, and of course he always should inquire of the mortgagee, first, as to the state of the mortgage debt and what is owing thereon; secondly, whether the mortgagee has already made any further advances to the mortgagor on the security of the land purchased; and thirdly, whether the mortgagee has vested in himself any other mortgages or charges which affect any other property of the mortgagor and which he is entitled to consolidate with his mortgage on the purchased land. And the purchaser should give formal notice to the mortgagee of his contract for purchase. It is true that the mortgagee is not bound to answer such inquiries unless an offer to redeem his charge is made (a). And if the mortgagee should decline to answer these inquiries, the purchaser cannot safely proceed with the contract, and would, it is submitted, be entitled to repudiate the same on the ground that the vendor has failed to prove, by the only evidence that can possibly be accepted, facts material to the title. But if the mortgagee do answer such inquiries precisely, after being informed of the purpose with which they are made, he will be estopped from denying the truth of his answers, and so cannot afterwards assert his own charges or interests upon the property so as to defeat or postpone the purchaser's interest acquired

(z) *Frere v. Moore*, 8 Price, 475, 488, 489; *Jones v. Powles*, 3 My. & K. 581, 596, 598; *Bates v. Johnson*, Joh. 304; *Bailey v. Barnes*, 1894, 1 Ch. 25, 36, 37. But a person entitled to a charge on the purchase money to be paid under a contract for the sale of

an equity of redemption, could not tack this charge to the legal mortgage: *Lacey v. Ingle*, 2 Ph. 413.

(a) *Bugden v. Bignold*, 2 Y. & C. C. C. 377, 390; *Low v. Bouverie*, 1891, 3 Ch. 82.

on the faith of the representations so made (*b*). And notice to the mortgagee of the sale of the equity of redemption will of course prevent him from tacking any subsequent advances to his legal security (*c*). But the purchaser of an equity of redemption in land cannot protect himself against equitable rights, which are prior to his own and are either unknown to or suppressed by the vendor, by any notices or inquiries. Notice of his purchase to the mortgagee seised of the legal estate can give him no priority over equitable incumbrancers already existing (*d*), and will not prevent a subsequent equitable incumbrancer from excluding him by tacking, if the subsequent incumbrancer should procure a transfer of the legal mortgage (*e*). The purchaser of an equity of redemption should inquire of the vendor whether he has created or is aware of any equitable charge, incumbrance or right which affects the property sold and is not disclosed by the abstract (*f*); and it is submitted that, as the purchaser is to acquire no legal estate which would protect him against unknown equities, this question is relevant to the title offered by the vendor, and the vendor cannot vouch the rule in *Re Ford and Hill* (*g*) as an excuse for refusing to answer (*h*). The purchaser should also inquire of the legal mortgagee whether he has had notice or is aware of any such equitable charge, incumbrance or right. But if these inquiries fail to inform

(*b*) *Ibbottson v. Rhodes*, 2 Vern. 554; *Strange v. Hawkes*, 4 De G. M. & G. 186, 196; *Low v. Bouvierie*, 1891, 3 Ch. 82.

(*c*) *Le Nove v. Le Nove*, Amb. 436, 446; *Beech v. Ellames*, 2 Anst. 427; see also *Hopkinson v. Rolt*, 9 H. L. C. 514; *Monzie v. Lightfoot*, L. R. 11 Eq. 459; *London and County Bank v. Ratchiffe*, 6 App. Cas. 722; *West v. Williams*, 1899, 1 Ch. 132.

(*d*) Above, p. 476, nn. (*q*), (*r*);

Rooper v. Harrison, 2 K. & J. 86; *Phelps v. Lovegrave*, L. R. 16 Eq. 80, 91; *Re Richards*, 45 Ch. D. 589; *Hopkins v. Hemswoorth*, 1898, 2 Ch. 347.

(*e*) *Peacock v. Burt*, 4 L. J. (N. S.) Ch. 33.

(*f*) *Perham v. Kempster*, 1907, 1 Ch. 373, 381.

(*g*) 10 Ch. D. 365.

(*h*) See above, pp. 135, n. (*r*), 178.

Purchaser's
right of
tacking.

the purchaser of some existing equitable incumbrance, and he only discover the same after payment of his purchase money, he will have no remedy but to procure, if he can, a transfer of the legal mortgage, and so forestall the other incumbrancer in using the resource of tacking. If he can accomplish this, he will be entitled to hold the land free from the claims of all persons entitled thereto or interested therein under any equitable rights of which he had no notice at the time when he paid his purchase money; and any subsequent notice of any such right will be immaterial (*i*): but he cannot so avoid any equities of which he *had* notice, either actual or constructive (*k*), before he actually paid the price agreed upon for the land (*l*). If, therefore, he receive notice of any such equities after the contract for sale, but before completion, of course he cannot safely proceed with the purchase unless the equities are released or the persons entitled thereunder concur in the conveyance to him (*m*).

Purchaser of
equity of
redemption
paying off
the first
mortgage—

It has been held that if the purchaser of an equity of redemption pay off the first mortgage when he has notice of an intermediate charge, the first mortgage is extinguished and the intermediate incumbrancer is entitled to enforce his security as the first charge on the land without redeeming the mortgage so paid off (*n*).

(*i*) See the cases cited above, pp. 476, 477, and notes. But where the legal estate is held on an express trust for the prior incumbrancer, the purchaser cannot obtain any advantage by getting in the same after he has had notice of the prior incumbrance: *Saunders v. Dehew*, 2 Vern. 271; *Mumford v. Stohwasser*, L. R. 18 Eq. 556; *Harpham v. Shacklock*, 19 Ch. D. 207; *Taylor v. London and County Bank*, 1901, 2 Ch. 231, 256, 257.

(*k*) *Le Neve v. Le Neve*, Amb.

436, 446; *Birch v. Ellames*, 2 Anst. 427; *Potter v. Sanders*, 6 Hare, 1; *Bailey v. Richardson*, 9 Hare, 734.

(*l*) *Tourville v. Naish*, 3 P. W. 306; *Story v. Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304; *Maunderell v. Maunderell*, 10 Ves. 246, 271; *Taylor v. Baker*, 5 Price, 306; *Rayne v. Baker*, 1 Giff. 241.

(*m*) Above, pp. 170, 238.

(*n*) *Toulmin v. Steers*, 3 Mer. 210.

This doctrine has been frequently mentioned with disapproval, though never precisely overruled (*o*). It has however been established that if, when the first mortgage is so got in, an intention be shown to keep the charge on foot, the purchaser will be entitled to the benefit thereof, and the intermediate incumbrancer cannot then enforce his security without redeeming the charge. And it is not necessary for this purpose that the mortgage should be transferred to a trustee for the purchaser; it will not merge if the intention to keep it alive appear either by express declaration or by inference from the surrounding circumstances, notwithstanding that the mortgage and the equity of redemption be both vested in the same person (*p*).

Keeping the charge on foot.

If the mortgagee under a legal mortgage of land purchase the equity of redemption, he will be entitled, under the doctrine of tacking, to hold the land free from all intermediate equitable incumbrances of which he had no notice at the time when he paid his purchase money (*q*). But with regard to mesne incumbrances of which he had notice and which were not discharged, it was formerly considered that, unless his mortgage

Purchase by mortgagee of the equity of redemption.

(*o*) See *Watts v. Symes*, 1 De G. M. & G. 240, 244; *Adams v. Angell*, 5 Ch. D. 634, 641, 645, 647; *Thorne v. Cann*, 1895, A. C. 11, 16—18; *Liquidation Estates Purchase Co. v. Willoughby*, 1896, 1 Ch. 726, 1898, A. C. 321.

(*p*) See cases cited in preceding note; and *Bailey v. Richardson*, 9 Hare, 734; *Phillips v. Guttridge*, 4 De G. & J. 531; *Hayden v. Kirkpatrick*, 34 Beav. 645; *Re Pride*, 1891, 2 Ch. 135. Of course, a mortgagor paying off a first mortgage created by himself cannot by any means set up the charge to defeat or hinder his own subsequent incumbrancers: *Watts v. Symes*, 1 De G. M. & G. 240, 244. Neither can he defeat his own

subsequent incumbrancers by purchasing the property at a sale thereof under a power of sale given by such first mortgage: *Otter v. Vaux*, 2 K. & J. 650, 6 De G. M. & G. 638. But if a man become entitled to an equity of redemption by descent or devise, he may keep alive for his own benefit any charge made by his predecessor which he chooses to pay off: *Davis v. Barrett*, 14 Beav. 542; or if he be himself the mortgagee under any such previous charge, the same will not merge if such be not his intention: *Forbes v. Maffitt*, 18 Ves. 384.

(*q*) Above, pp. 477, 480, and notes.

were transferred to a trustee for himself for the purpose of keeping it alive, it merged in his ownership of the premises, with the consequence that the mesne incumbrances became first charges thereon, and the incumbrancers could enforce their securities without redeeming the legal mortgage (*r*). But it is now established in this case, as well as that of the redemption of a first mortgage by the purchaser of an equity of redemption, that if an intention to keep the mortgage on foot be shown, either by express declaration or by implication from the surrounding circumstances, the mortgagee purchasing the equity of redemption may avail himself of the charge as a protection against mesne incumbrancers, of whose claims he had notice, notwithstanding that the first mortgage, as well as the equity of redemption, be vested in himself alone; and when such an intention is shown the mesne incumbrancers must redeem the first mortgage if they wish to enforce their securities (*s*). Both a mortgagee purchasing the equity of redemption, and the purchaser of an equity of redemption redeeming the mortgage, should be careful to take a conveyance in such form that there can be no doubt whether it is intended to keep the charge alive or not (*t*). A charge so kept on foot remains the personal estate of the party, for whose benefit it is preserved: but it may subsequently be merged by any assurance of the land which would make it a fraud to keep the charge alive (*u*).

Marshalling
securities.

In connexion with the sale of an equity of redemption, it may be useful to mention the rules as to marshalling

(*r*) 2 Dart, V. & P. 917, 5th ed.; 1040, 6th ed.; 952, 7th ed.; *Toulmin v. Steere*, 3 Mer. 210, 224.

(*s*) *Adams v. Angell*, 5 Ch. D. 634; above, p. 481, note (*p*).

(*t*) See *Adams v. Angell*, ubi

sup.; Davidson, Prec. Conv. vol. ii. pt. i. 324, n., 327, n., 4th ed.; 1 Key & Elph. Prec. Conv. 490, 531, and notes, 4th ed.; 486, 525, and notes, 8th ed.

(*u*) *Re Gibbon*, 1909, 1 Ch. 367; above, p. 433.

securities. Where two properties belonging to the same owner have been mortgaged by him to the same mortgagee or are otherwise subject to some paramount charge affecting both of them (*x*), and he has subsequently assigned over one of them for valuable consideration, whether on sale, mortgage, or settlement (*y*), then if the paramount incumbrancer satisfy his security out of the property so assigned (*z*), the assignee is entitled in equity, as against the owner, the trustee in his bankruptcy (*a*), and his representatives taking by succession after his death and subject to any agreement to the contrary (*b*), to have the securities marshalled, that is, to stand in the place of the paramount incumbrancer with regard to the other property to the extent of the value of the property taken (*c*) to satisfy the paramount charge. The assignee is in fact entitled, in equity, as against the owner, his trustee in bankruptcy, heirs, executors, administrators and devisees, and in default of agreement to the contrary, to have the property so assigned to him exonerated from the charge (*d*).

(*x*) See *Webb v. Smith*, 30 Ch. D. 192, 200, 202; *The Chioggia*, 1898, P. 1, 6. Marshalling is also permitted where several properties have by consolidation of mortgages become subject to the entire claim of one mortgagee; above, pp. 476, 477, and note (*s*); where properties belonging to different owners are pledged for the same debt; *Goins v. Farrell*, Beatt. 472; and in favour of a surety; *Heyman v. Du Bois*, L. R. 13 Eq. 158.

(*y*) Marshalling has been allowed in favour of the grantees under a voluntary settlement containing covenants that the land settled should remain to the uses assured, and for quiet enjoyment; *Hales v. Cox*, 32 Beav. 118; but not where there was a covenant for further assurance only; *Ker v. Ker*, 1 R. 4 Eq. 15; *Re Jones*, 1893, 2 Ch. 461, 473, 474.

(*z*) The paramount incumbrancer is entitled to satisfy his security out of whichever property he may choose first to resort to, and the Court will not interfere with the exercise of this right; *Wallis v. Woodyear*, 2 Jur. N. S. 179.

(*a*) See *Expte. Hartley*, 1 Deac. 288; *Babbwin v. Belcher*, 3 Dru. & War. 173, 176; *Gibson v. Seagrism*, 20 Beav. 614; *Heyman v. Du Bois*, L. R. 13 Eq. 158.

(*b*) See *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*c*) See *Cradock v. Piper*, 15 Sim. 301, 302.

(*d*) *Hardwicke, C., Lanoy v. Athol*, 2 Atk. 444, 446; *Eldon, C., Aldrich v. Cooper*, 8 Ves. 382, 395; *Averall v. Wade*, L. & G. t. Sugd. 252, 259; *Hughes v. Williams*, 3 Mac. & G. 683, 690, 691; *Handcock v. Handcock*, 1 Lr. Ch. 444, 474; *Tidd v. Lister*, 10 Hare, 140, 157, 3 De G. M. &

This equity is however enforced only against the persons above specified and not against any assignees by act *inter vivos*, whether taking for value or gratuitously, of the other property (*e*). If therefore in the case put the owner assign to different persons both of the properties subject to the paramount charge, the assignee who is prior in time will lose the right, which but for the subsequent assignment he would have enjoyed, to have the property assigned to him entirely exonerated from the charge. But he will not be deprived of all right of marshalling; for if the paramount incumbrancer exhaust that property, he will still have the right to have the securities marshalled by apportioning the paramount charge on both properties rateably according to their respective values, and standing in the paramount incumbrancer's place as against the other property in respect of that proportion of the paramount charge which according to such apportionment it ought to bear (*f*), and to the extent of the property, which according to such apportionment was that assigned to him; that is to say, up to the value of the property exhausted after deducting its due proportion of the paramount charge (*g*). Thus if Blackacre, worth 2,000*l.*, and Whiteacre, worth 1,000*l.*, belonging to A. be mortgaged to B. for 2,100*l.*, and then Blackacre be mortgaged to C. for 900*l.*, and B. sell Blackacre for 2,000*l.* and so repay himself to that extent, C. is entitled to stand in B.'s place as against Whiteacre; and if Whiteacre should sell for 1,000*l.*,

G. 857, 872; *Gibson v. Seagrim*, 20 Beav. 614; *Kay, L. J., Flint v. Howard*, 1893, 2 Ch. 54, 72; *Re Jones*, 1893, 2 Ch. 461, 470 *sq.*

(*e*) See *Dolphin v. Aylward*, L. R. 4 H. L. 486, 501; *Flint v. Howard*, 1893, 2 Ch. 54, 61, 72, 73.

(*f*) *Barnes v. Racster*, 1 Y. & C. C. C. 401, 410; *Burden v. Bignold*, 2 Y. & C. C. C. 377;

Stronge v. Hawkes, 4 De G. & J. 632, 641, 651—653; *Wellestey v. Mornington*, 17 W. R. 355; *Moxon v. Berkeley, &c. Bdg. Socy.*, 59 L. J. Ch. 524, 526; *Flint v. Howard*, 1893, 2 Ch. 54; *Wood v. West*, 40 Sol. J. 114; *Baglioni v. Cavalli*, 49 W. R. 236.

(*g*) See note (*e*) to p. 483, above.

C. would be entitled to the balance after satisfying the remainder of B.'s charge. But if before the sale of Blackacre A. had sold Whiteacre to D., then in adjusting the equities between C. and D. after the sale of Blackacre, the paramount charge of 2,100*l.* would have to be apportioned between Blackacre and Whiteacre according to their values, 1,400*l.* being attributed to Blackacre and 700*l.* to Whiteacre, and C. would only be entitled to stand in B.'s place as regards Whiteacre in respect of the 700*l.* so apportioned. Out of this sum B. would first take his remaining 100*l.*, then C. would have 600*l.* and subject thereto Whiteacre or the proceeds of sale thereof would belong to D. (*h*). It does not appear that in these cases the rights of the assignees are altered by the circumstance that the second assignee took with notice, either express or implied, of the first assignment (*i*): but the second assignment may of course be made on the terms that the assignee shall take subject to the satisfaction or full enforcement of the first assignee's right to have the property assigned to him entirely exonerated from the paramount charge, and if so, the second assignee's rights will be determined by such agreement (*k*). It seems, however, that if the paramount charge were a legal mortgage and either assignee should get it in, the parties' rights might be varied by the doctrine of tacking (*l*). Thus in the example given, if D. had purchased Whiteacre without Tacking.

(*h*) See cases cited in the last note but one.

(*i*) See Kay, L. J., *Flint v. Howard*, 1893, 2 Ch. 54, 73, and other cases cited in the last note but two. It is thought that these authorities have overruled the doctrine laid down in *Hamilton v. Royle*, 2 Sch. & Lef. 315, 327—329, and *Aicken v. Macklin*, 1 Dru. & Walsh, 621, 634, 635, that, where the second assignee takes with notice of the first

assignment, or subject generally to all equities previously created, he takes subject to the first assignee's original equity to marshal. It is thought that the propositions stated in Dart, V. & P. 914, 5th ed. (1035, 6th ed., and still retained, 947, 7th ed.), in reliance on these cases cannot now be maintained.

(*k*) See *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*l*) Above, pp. 477, 479, 480.

notice of C.'s charge on Blackacre, and had afterwards taken a transfer of B.'s mortgage, D. might sell Blackacre in satisfaction, so far as it would extend, of that mortgage, and then tack his interest in Whiteacre to B.'s charge thereon and so exclude any equity of C. against Whiteacre. Or if C. had first obtained a transfer of B.'s mortgage, he might have sold Whiteacre to satisfy that mortgage *pro tanto* (*m*) and then tacked his own charge on Blackacre thereto (*n*).

Interest now chargeable on a mortgage.

Since the repeal of the Usury Laws (*o*), any rate of interest that the parties may agree to may be taken on a mortgage debt and secured on the mortgaged property; a commission stipulated for by the mortgagee and deducted from the loan will, in the absence of any fraud or undue influence, be allowed in taking the accounts (*p*); and agreements for charging compound interest, or capitalising interest which may fall into arrear, are no longer invalid (*q*). The Court however strenuously upholds the rules that no stipulation forming part of a contract or transaction of mortgage, that the security shall not be redeemable according to the rules of equity, shall have any effect in equity (*r*); and

Mortgage cannot be made irredeemable.

(*m*) See note (*z*) to p. 483, above.

(*n*) *Tithly v. Davies*, 2 Eq. Ca. Abr. 604, pl. 35, 36, 2 Y. & C. C. C. 383, n., 393—395; *Sober v. Kemp*, 6 Hare, 155; *Liverpool Marine Credit Co. v. Wilson*, L. R. 7 Ch. 507, 512; *Flint v. Howard*, 1893, 2 Ch. 54, 68, 69; *Dart*, V. & P. 914, 915, 5th ed.; 1036, 6th ed.; 947, 948, 7th ed.

(*o*) By stat. 17 & 18 Vict. c. 90; see *Wms. Real Prop.* 545, n. (*e*), 21st ed.

(*p*) *Mainland v. Upjohn*, 41 Ch. D. 126. As to undue influence, see below, Chap. XIV. § 2.

(*q*) *Clarkson v. Henderson*, 14 Ch. D. 348; *Davidson*, *Precedent*. vol. ii. pt. ii., p. 360, n.,

4th ed.; *Mainland v. Upjohn*, 40 Ch. D. 126, 136, 142, 143; *Wrigley v. Gill*, 1906, 1 Ch. 165. In the absence of agreement to the contrary, simple interest only is chargeable in respect of a mortgage debt carrying interest; *Daniell v. Sinclair*, 6 App. Cas. 181; *Ainsworth v. Wilding*, 1905, 1 Ch. 435.

(*r*) *Price v. Perrie*, 2 Freem. 258; *Salt v. Northampton*, 1892, A. C. 1. Thus a stipulation in the mortgage contract that the mortgagee shall or may purchase the mortgaged property is void; *Samuel v. Jarrah, &c. Corp.*, 1904, A. C. 323. But the mortgagee may by an agreement made subsequently to the mort-

that any agreement to fetter the equity of redemption with some other condition than the payment of the principal, interest and costs due under the mortgage is invalid (*s*). It may be mentioned here that, under the Moneylenders Act, 1900 (*t*), a mortgage of land to a moneylender (*u*) is void, if not made to him in his registered name (*x*) or if in other respects the transaction were not carried out in conformity with the requirements of the Act (*y*).

Equity of redemption not to be clogged.

Mortgages to money-lenders.

gage purchase the equity of redemption; *Reeve v. Lisle*, 1902, A. C. 641; above, pp. 481, 482.

(*s*) *Jennings v. Ward*, 2 Vern. 520; *James v. Kerr*, 40 Ch. D. 449, 459 (agreement for subsequent payment of a bonus to the mortgagee held void); *Field v. Hopkins*, 44 Ch. D. 524 (agreement for adding to the security a solicitor-mortgagee's profit costs held void; since allowed by stat. 58 & 59 Vict. c. 25); *Noakes & Co., Ltd. v. Rice*, 1902, A. C. 24 (covenant on mortgage of a leasehold public-house to take beer during the term from the mortgagee only held not to bind the mortgagor after redemption); *Bradley v. Carritt*, 1903, A. C. 253 (agreement on mortgage of shares in a tea company that the mortgagee should have the sale of all the company's teas as broker held no longer binding after redemption); *British South Africa Co. v. De Beers, & Co. Ltd.*, 1910, 1 Ch. 354 (agreement to grant an exclusive licence to the mortgagee to work certain diamondiferous ground held void as a fetter on the equity of redemption); *Morgan v. Jeffreys*, 1910, 1 Ch. 620 (stipulation that the mortgage should not be paid off for twenty-eight years without the consent of the mortgagee held void). Cf. *Biggs v. Hoddinnott*, 1898, 2 Ch. 307, where on a

mortgage of an hotel to a brewer covenants to take beer from the mortgagee only during the continuance of the security and for the continuance of the loan for five years were upheld; *Santley v. Wilde*, 1899, 2 Ch. 474 (where an agreement to pay to the mortgagee of a leasehold theatre one-third of the profit rental thereof during the term was held valid by the C. A.). The latter decision was however criticised adversely in *Noakes & Co., Ltd. v. Rice*, 1902, A. C. 24, 28, 31, 32, 34; and *Bradley v. Carritt*, 1903, A. C. 253, 255 *sq.*

(*t*) Stat. 63 & 64 Vict. c. 51, s. 2 (1).

(*u*) See sect. 6; *Sadler v. Whiteman*, 1910, 1 K. B. 868, reversed, 1910, W. N. 193.

(*x*) *Chapman v. Michaelson*, 1908, 2 Ch. 612, 1909, 1 Ch. 238; see also *Bonnard v. Dott*, 1906, 1 Ch. 740; *Staffordshire Financial Co. v. Valentine*, 1910, 2 K. B. 233; and cf. *Lodge v. National Union Investment Co.*, 1907, 1 Ch. 300.

(*y*) See *Gadd v. Provincial Union Bank*, 1909, 2 K. B. 353; reversed, nom. *Kirkwood v. Gadd*, 1910, A. C. 422; *Jackson v. Price*, 1910, 1 K. B. 143; *Re Seed*, ib. 661; *Re a Debtor* (No. 2 of 1910), 1910, W. N. 70; *Rueter v. Bradford Advance Co.*, 26 Times L. R. 533.

§ 11.—*Sale of Licensed Property.*

Sale of
licensed
property.

On the sale of a public-house or other licensed property as a going concern, the vendor is bound, on the day fixed for completion, to produce a valid and effectual licence of the kind promised by the contract, and to indorse or to procure the holder thereof to indorse the same to the purchaser, so that the purchaser may be enabled to apply at once for interim authority to carry on the business until the next special sessions, and to apply at such sessions for a transfer of the licence (z). And on the sale of such property, time is of the essence of the contract; so that if the vendor cannot perform his obligation in this respect on the very day fixed for completion, the purchaser is entitled to repudiate the contract (a). But in the absence of special stipulation to the contrary, the vendor is not bound to do more than this, or to procure for the purchaser a transfer of the licence or even interim authority to carry on the business, and does not warrant that such transfer or interim authority shall be procured; and the purchaser buys subject to the risks that the licence will not be renewed at the next annual Brewster sessions (b), that the transfer of the licence to him will be refused at the special sessions, and that interim authority will not be accorded to him (c).

(z) *Tadcaster Tower Brewery Co. v. Wilson*, 1897, 1 Ch. 705. As to the duties now imposed on liquor licences, see stat. 10 Edw. VII. c. 8, ss. 43—53.

(a) *Seaton v. Mapp*, 2 Coll. 556; *Day v. Lukke*, L. R. 5 Eq. 336; *Claydon v. Green*, L. R. 3 C. P. 511; *Cowles v. Gale*, L. R.

7 Ch. 12; *Powell v. Marshall, Parkes & Co.*, 1899, 1 Q. B. 710, 712.

(b) See *Sharp v. Wakefield*, 1891, A. C. 173; stat. 4 Edw. VII. c. 23, s. 1; *Grimsdick v. Sweetman*, 1909, 2 K. B. 740; below, p. 490 and n. (n).

(c) *Tadcaster Tower Brewery Co. v. Wilson*, 1897, 1 Ch. 705.

By the Licensing Act, 1904 (*d*), where Quarter Sessions refuse the renewal of an existing on-licence under that Act, the amount therein specified (representing the difference between the value of the licensed premises with and without the licence (*e*)) is to be paid as compensation to the persons interested in the licensed premises. And the Act authorised a compensation charge at the rates therein specified to be imposed by Quarter Sessions in respect of all existing on-licences renewed in each year (*f*). This charge is imposed for the period from April 5th of the year in which it is payable until April 5th of the succeeding year; and on the sale of any licensed property during such period the amount of the charge is an outgoing apportionable between the vendor and purchaser accordingly (*g*). The Act further provides (*h*) that such deductions from rent

Compensation
for non-
renewal of
licence.

Compensation
charge on
licences.

(*d*) Stat. 4 Edw. VII. c. 23, s. 2 (1); see the Licensing Rules, 1904, Nos. 21—34, W. N. 14th Jan. 1904. Under these rules the persons interested are the licensee, the registered owner of the premises, and any other person duly claiming and determined to be entitled to compensation thereunder; and the amount of compensation, when determined, is divided between those persons in the shares settled by the compensation authority, or otherwise as therein provided; see *Liverpool Corpn. v. Peter Walker & Son, Ltd.*, 1908, 2 K. B. 33. Any compensation money so awarded to any person interested in the premises as owner (whether he be freeholder or lessee) stands in the place of his interest therein, is equivalent to the proceeds of a compulsory sale thereof, and is payable, where he has mortgaged that interest, to the mortgagee; *Law Guarantee, &c. Socy. v. Mitcham, &c. Co. Ltd.*,

1906, 2 Ch. 98; *Noakes v. Noakes & Co. Ltd.*, 1907, 1 Ch. 64; *Dawson v. Braine's, &c. Ltd.*, 1907, 2 Ch. 359; *Re Bentley's Yorkshire Breweries, Ltd.*, 1909, 2 Ch. 609. And where his interest in the premises is subject to any trust or equity, or his claim of compensation was made as agent for others, the compensation money awarded to him is subject to the same trust or equity or to his principals' rights: *Birkin v. Smith*, 1909, 2 K. B. 112; see also *Bent's Brewery Co. Ltd. v. Dykes*, 1909, W. N. 51, 100 L. T. 476.

(*e*) See *Re Ashby's, &c. Co.*, 1906, 2 K. B. 754; *Liverpool Corpn. v. Peter Walker & Son, Ltd.*, 1908, 2 K. B. 33.

(*f*) Stat. 4 Edw. VII. c. 23, s. 3 (1).

(*g*) *Horton v. Penn*, 1907, 1 K. B. 561; see above, pp. 50, 67, 74.

(*h*) Sect. 3 (3).

Effect of
refusal to
renew licence
in case of a
leasehold
licensed
house.

as are set out in the Second Schedule thereto (*i*) may, notwithstanding any agreement to the contrary (*k*), be made by any licence-holder who pays the charge and also by any person from whose rent a deduction is made in respect of the payment of the charge. The deductions so authorised constitute a charge upon the rent as against the person, who would otherwise be entitled to receive it (*l*); and regard must of course be had to this liability on the purchase of the freehold or leasehold reversion on a lease of licensed property. When a licensed house has been demised for a term of years by a lease containing a covenant by the lessee to use the premises as a licensed house and not otherwise, and the renewal of the licence is afterwards refused, the covenant is discharged for impossibility of performance (*m*), but in other respects the lease remains valid and the lessee is accordingly bound to pay the rent reserved without any deduction on that account (*n*).

(*i*) The amount which may be so deducted varies by degrees from 100 per cent. of the charge where the tenant's unexpired term does not exceed one year down to 1 per cent. of the charge where the unexpired term exceeds 55 but does not exceed 60 years; but the amount to be deducted is in no case to exceed half the rent. The unexpired term is to date from the day on which the compensation charge is payable by the licence-holder; *London County Council v. Watney, &c. Ltd.*, 1909, 1 K. B. 637. It has been held that the word *term* is here used in its proper legal meaning, so that a tenant holding under an unexpired term of not more than two years was entitled to deduct the amount allowed (88 per cent.) in respect of that term, notwithstanding that he also had a reversionary lease (which only gave

him an *interesse termini* at law) for a further period of years from the day but one after the date of the expiration of his existing term; *Llangattock v. Watney, &c. Ltd.*, 1910, 1 K. B. 236, affirmed, 1910, A. C. 394; see above, p. 372.

(*k*) Whether made before or after the Act; *Wooler v. North Eastern Breweries*, 1910, 1 K. B. 247.

(*l*) *Re Smith*, 1906, 1 Ch. 799, 803, deciding that, where the person entitled to the rent is a tenant for life, he is not entitled to have the amount of the charge raised out of capital. See also *Hancock v. Gillard*, 1907, 1 K. B. 47; *Smith v. Lion Brewery Co. Ltd.*, 1909, 2 K. B. 912.

(*m*) See below, Chap. XVIII. § 1.

(*n*) *Grimsdick v. Sweetman*, 1909, 2 K. B. 740.

§ 12.—*Land subject to Restrictive Covenants.*

As we have seen (*o*), the fact that any land purchased is subject to restrictive covenants is such a defect of title as justifies the purchaser in refusing to perform the contract; unless the vendor should have expressly stipulated that the purchaser shall make no objection to the title on that account. And *a fortiori*, any statutory restriction on the use of land furnishes a like objection to the title (*p*). A vendor of land subject to such covenants or restriction must, of course, be careful to make a special condition of sale to the above effect. It is now settled, with regard to covenants relating to land and entered into by a tenant in fee with a former owner, from whom he purchased, or with an adjoining landowner (*q*), that in so far as such covenants bind the covenantor to some forbearance restrictive of the free use of his land (*r*), and were made with the object of benefiting the owners and occupiers of some other land retained by the former owner or belonging to the adjoining landowner, as the case may be (*s*), the burthen thereof runs with the land in equity, though not at law; that is to say, the restrictions are enforceable in equity by action for an injunction against all persons who acquire the land from the covenantor, either by act of law or assignment (*t*), except only (as in the case of other equities)

Land subject to restrictive covenants.

Statutory restriction.

(*o*) Above, pp. 167, 195–197.

(*p*) *Bird v. Eggleton*, 29 Ch. D. 1012; *Re Ponsford and Newport School Board*, 1894, 1 Ch. 454; *Re Bosworth and Gravesend Corp.*, 1905, 1 K. B. 403, 2 K. B. 426.

(*q*) The law is the same where the adjoining landowner is the covenantor's lessee: *Brigg v. Thornton*, 1904, 1 Ch. 386; *Ricketts v. Enfield Churchwardens*, 1909, 1 Ch. 544.

(*r*) See *Powell v. Hemsley*, 1909, 1 Ch. 680, 2 Ch. 252, where it was considered that a covenant

to submit plans before commencing any building implied an obligation not to build without first submitting plans. Restrictive covenants are however construed strictly, and not so as to create a wider obligation than is imported by the words actually used: *Brigg v. Thornton*, 1904, 1 Ch. 386.

(*s*) See *Formby v. Barker*, 1903, 2 Ch. 539; *Reid v. Bickerstaff*, 1909, 2 Ch. 305, 320, 325–328.

(*t*) *Tulk v. Moxhay*, 2 Ph. 774; *Renals v. Cowlishaw*, 9 Ch. D.

such assigns as have acquired the legal estate in the land as purchasers for value in good faith, without notice of the covenant (*u*). But the burthen of covenants by a tenant in fee to do some positive act upon or relating to his land, as to repair a road or build a house or a wall, does not run with the land either at law or in equity. And where a landowner enters into restrictive covenants with some person, but not with the object of benefiting the owners and occupiers of some other land belonging to the covenantee, as where a vendor sells all his land in some particular place, retaining no adjoining or neighbouring land, and the purchaser enters into covenants restrictive of the use

*Formby v.
Barker.*

125, 11 Ch. D. 866; *Austerberry v. Oldham*, 29 Ch. D. 750; *Spicer v. Martin*, 14 App. Cas. 12; *MacKenzie v. Childers*, 43 Ch. D. 265; *Rogers v. Hosegood*, 1900, 2 Ch. 388. In *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391, 1906; 1 Ch. 386, it was held that the burthen of restrictive covenants is incumbent on a person, who has wrongfully ejected the covenantor or his successor in estate bound by the covenants. This decision is however inconsistent with the rule laid down in *Finch's Case*, 4 Inst. 85 (which was not cited to the Court), that a disseisor is not bound by a trust incumbent on the disseisee; and it is respectfully submitted that the case of *Re Nisbet and Potts* was decided on erroneous principles; see the writer's criticism in 51 Sol. J. 141, 155; Wms. Real Prop. 181—183, 21st ed.

(*u*) *Carter v. Williams*, L. R. 9 Eq. 678; *London & South Western Rail. Co. v. Gomm*, 20 Ch. D. 562, 583; *Nottingham, &c. Co. v. Butler*, 16 Q. B. D. 778, 787, 788; *Rowell v. Satchell*, 1903, 2 Ch. 212, 221. Notice may, of course, be either actual or constructive: *Wilson v. Hart*, L. R. 1 Ch. 463; *Patman v. Harland*, 17 Ch. D. 353; above, pp. 246 sq. Where

land subject to the burthen of restrictive covenants is taken under the Lands Clauses Act, 1845 (stat. 8 & 9 Vict. c. 18), and the parties entitled to the benefit of the covenants receive compensation, the burthen is extinguished. If however such parties be not compensated, the burthen of the covenants continues to affect the land; although, so long as the land is used in accordance with the statutory powers, under which it was taken, the rights given by those powers are paramount to the obligation of the covenants: *Kirby v. Harrogate School Board*, 1896, 1 Ch. 437; *Long Eaton, &c. Co. v. Midland Ry.*, 1902, 2 K. B. 574. But if the land be sold or disposed of as superfluous, the burthen (if not extinguished by payment of compensation) will revive; *Ellis v. Rogers*, 29 Ch. D. 661; *Bird v. Eggleton*, *ib.* 1012. With respect to the powers of a corporation, which has been authorised by statute to acquire land for some special purpose, to enter into covenants restrictive of its use, see *Re South Eastern Ry. Co. and Wiffin's Contract*, 1907, 2 Ch. 366; *Stourcliffe Estates Co. Ltd. v. Bournemouth Corpn.*, 1910, 2 Ch. 12; below, Chap. XVI.

thereof with the vendor, the burthen of the covenants does not run in equity with the covenantor's land, and the covenantee cannot enforce them by action for an injunction against the covenantor's assigns, whether they had notice of the covenants or not; for the burthen imposed in equity by restrictive covenants is analogous to the burthen of an easement, which cannot exist in the absence of a dominant tenement (*x*). In such cases the covenantors and their representatives in law are liable personally upon such covenants; but their assigns of the land, as such, do not come under any liability in respect thereof (*y*). It is therefore no objection to the title to land that the owner or his predecessor seised thereof in fee has entered into some covenant relating thereto, either of a positive and not of a restrictive nature, or of a restrictive nature but not made with the object of benefiting some other land. With respect to stipulations restrictive of the use of land, they may be attached to land as a burthen thereon in equity, not only by express covenant, but also by an express or implied contract entered into, without deed, by the tenant in fee simple of the land (*z*). Thus, where lands are laid out and sold in plots as a building estate, and by the conditions of sale the purchasers are required for their mutual benefit to observe stipulations restrictive of the use of the plots purchased, the burthen of

How restrictions on the use of land may be created.

(*x*) *Fornby v. Barker*, 1903, 2 Ch. 539.

(*y*) *Haywood v. Brunswick, &c. Society*, 8 Q. B. D. 403; *Austerberry v. Oldham*, 29 Ch. D. 750; *Holford v. Acton, &c.*, 1898, 2 Ch. 240. *Fornby v. Barker*, *ubi sup.* The personal liability to damages at law for breach of a restrictive covenant exists equally where the covenant was expressly made for the benefit of some particular land: but the covenantor is under no greater liability at law for the acts of his assigns

than he has assumed by the terms of the covenant, and he is not so liable for breaches of covenant committed by his assigns without his assent, unless he has expressly undertaken such liability: see *Bailey v. De Crespigny*, L. R. 4 Q. B. 180, 186, 187; *Hall v. Ewen*, 37 Ch. D. 74, 82; *Potter v. Hensley*, 1909, 1 Ch. 680, 688, 689, 2 Ch. 252, 256—258.

(*z*) *Talk v. Moxhay*, 2 Ph. 774, 778; *Carter v. Williams*, L. R. 9 Eq. 678.

these stipulations will be attached in equity to the purchased lands, although the purchasers should not enter into any deed of covenant to observe the same. And if in such case it appear from the conditions or the circumstances attending the sale that the intention is that the purchasers shall have the benefit of the restrictive stipulations as regards all the lands offered for sale, the burthen of these stipulations will attach to any of the lands which may remain unsold, and will be enforceable accordingly against the vendor, his representatives in law and assigns taking with notice thereof (*a*). And not only may lands be subjected to the burthen of restrictive stipulations by contract implied on the part of the tenant in fee from the terms on which he has offered the same, together with adjoining lands, for sale and has sold the adjoining lands to purchasers, but if a block of lands or houses be offered to be let on lease on the terms that all the tenants shall enter into the same restrictive covenants, so that each tenant is offered the advantage to be gained from the other tenants' covenants, any of the lands or houses remaining unlet will be subject, in the hands of the lessor, his representatives in law and assigns with notice, to the burthen of the restrictive stipulations (*b*). And in such cases it appears that the agreement giving rise to an equitable right to enforce the restrictions may be established by parol evidence, notwithstanding the Statute of Frauds (*c*), under the doctrine of part performance (*d*). It follows that anyone who is about to

(*a*) See *Reynolds v. Cowlshaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Spicer v. Martin*, 14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. D. 265; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Holford v. Acton, &c.*, 1898, 2 Ch. 240, 246; *Rowell v. Satchell*, 1903, 2 Ch. 212; *Elliston v. Reacher*, 1908, 2 Ch. 374, 665; cf. *Tucker v. Fowles*, 1893, 1 Ch. 195; *Reid*

v. Bickerstaff, 1909, 2 Ch. 305; *Willé v. St. John*, 1910, 1 Ch. 84, 325.

(*b*) *Spicer v. Martin*, 14 App. Cas. 12.

(*c*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*d*) Above, pp. 12, 13; *Piggott v. Stratton*, 1 De G. F. & J. 33, 49; and see Lord Macnaghten's judgment in *Spicer v. Martin*, 14 App.

sell or let lands in lots, subject to restrictive covenants to be entered into by the various purchasers or lessees, should be careful, unless he is willing that the unsold or unlet land shall be affected with the same burthen, to stipulate expressly that, as regards any of the lots which shall not be sold or let, he shall not stand in the place of a purchaser or lessee thereof so as to be bound by the covenants (*e*). If land subject to any stipulation restrictive of the user thereof come to the hands of anyone who takes the legal estate as purchaser for value in good faith without notice of the restriction, he is, as we have seen (*f*), entitled to hold the land free from the restriction, and any purchaser from him will enjoy the same immunity, even though such purchaser bought with notice of the restriction. But if a man's title to hold land free from some such restriction depend on proof of the fact that he so purchased the same without notice as above mentioned, he will not be able to oblige a purchaser from him under an open contract to specific performance of the agreement for sale (*g*); for the Court considers that a title depending on proof of such a fact is too doubtful to force upon an unwilling purchaser (*h*). In such a case, therefore, the vendor must be careful to protect himself by a special condition of sale.

Cas. 12, 20—25, where he considered that though the appellant might not have incurred any contractual liability on the construction of the correspondence between the parties and had not made any false representation which he was estopped from disputing, as to an existing fact, he had nevertheless "invited the public to come in and take a portion of an estate which was bound by one general law." This invitation or offer, however, could only be established by admitting evidence, outside the written memorandum of the contract for letting, of the circumstances under which the appellant

had bought and subsequently let the lands in question.

(*e*) See 1 Davidson, *Prec. Conv.* 712, 4th ed.; 576, 5th ed.; Davidson's *Concise Precedents*, 123, 124, 18th ed.; *Osborne v. Bradley*, 1903, 2 Ch. 446; *Whitchose v. Hugh*, 1906, 2 Ch. 283, where power was reserved on a sale of allowing a variation of the plans and conditions; and cf. *Elliston v. Reacher*, 1908, 2 Ch. 374, 665.

(*f*) Above, p. 491.

(*g*) *Nottingham, &c. Co. v. Butler*, 16 Q. B. D. 778.

(*h*) *Freer v. Hesse*, 4 De G. M. & G. 495; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

Devolution of
the benefit of
restrictive
covenants.

With respect to the devolution of the benefit of a covenant or contract restrictive of the use of the land and entered into by a tenant in fee with a vendor or an adjoining landowner, the question to be considered is whether the parties to the contract intended that the benefit thereof should enure to the person originally entitled to enforce the obligation in his capacity of owner of some neighbouring land and should be annexed to the ownership of that land (*i*). If this be the case the benefit of the contract will pass, without express mention, by a conveyance of that land, in the same manner as an easement appurtenant thereto will pass therewith at law (*k*); and any assign, whether in fee or for any less estate (*l*), of the neighbouring land will be entitled in equity to enforce the restrictions (*m*). And for this purpose it is not necessary that the assign should be *in* of the same estate as the original contractor had (*n*). If the restrictions be created by covenant, it appears that the benefit of the covenant will run at law with the land, for the advantage of which the restrictions were imposed; but that an assignee of the land could not sue on the covenant at law unless he took the original covenantor's estate therein (*o*). On the other hand, an assign of the person, in whose favour the covenant or contract was made, will have no right to enforce the restrictions if he cannot prove either (1) that he is an express assignee of the benefit of the covenant, or (2) that the covenant was

(*i*) See *Elliston v. Reacher*, 1908, 2 Ch. 374, 384, 665; *Reid v. Bickerstaff*, 1909, 2 Ch. 305, 319, 320 *sq.*; *Willie v. St. John*, 1910, 1 Ch. 84, 325; and other cases cited above, pp. 491, *nn.* (*s*), (*t*), 494, *n.* (*a*).

(*k*) *Child v. Douglas*, Kay, 560, 568; *Rogers v. Hosegood*, 1900, 2 Ch. 388; *Elliston v. Reacher*, *ubi sup.*

(*l*) *Tait v. Gosling*, 11 Ch. D. 273.

(*m*) *Whatman v. Gibson*, 9 Sim. 196; *Mann v. Stephens*, 15 Sim. 377; *Coles v. Sims*, 5 De G. M. & G. 1; and cases cited in the two preceding notes.

(*n*) See note (*k*), above.

(*o*) *Rogers v. Hosegood*, 1900, 2 Ch. 388, 404.

made for the benefit of some particular land, to which the benefit of the covenant was thus annexed and of which he is the assign, or (3) that there was a building or similar scheme annexing restrictions on certain pieces of land for the benefit of all purchasers or lessees thereof (*p*), and he derives title to one of those pieces of land as or through such a purchaser or lessee (*q*). When the benefit of such a covenant or contract has passed to an assign of the land, for the advantage of which the restriction was created, the burthen of the contract cannot, of course, be effectually released by any act or any deed of the person originally entitled to enforce the agreement (*r*). If a landowner entitled to the benefit of a contract restricting the use of adjoining land make or permit such use of his own land that it would be unreasonable for him to insist any longer on the observance of the restrictions with respect to the adjoining land, he will lose his equitable right to enforce such restrictions specifically by action for an injunction (*s*). Such a landowner may also lose this equitable right by acquiescence in breach of the restrictions or delay in asserting the right (*t*). These facts will not, however, deprive him of any right he may have to enforce the contract at law, although they may be taken into con-

(*p*) See above, pp. 493, 494.

(*q*) *Elliston v. Reacher*, 1908, 2 Ch. 374, 384, 665; *Reid v. Bickerstaff*, 1909, 2 Ch. 305, 319, 320 *sq.*; *Willé v. St. John*, 1910, 1 Ch. 84, 325.

(*r*) *Rogers v. Hosegood*, 1900, 2 Ch. 388.

(*s*) *Bedford v. Trustees of British Museum*, 2 My. & K. 552. See *Osborne v. Bradley*, 1903, 2 Ch. 446, but note that the ground on which that decision is founded (*viz.*, that the restriction was created for the benefit of the vendor, but not as the owner of

any particular property) appears to be taken away by the decision in *Formby v. Barker*, above, p. 492; *Elliston v. Reacher*, 1908, 2 Ch. 374, 393, 665.

(*t*) *Roper v. Williams*, T. & R. 18; *Peck v. Matthews*, L. R. 3 Eq. 515; *Gaskin v. Balls*, 13 Ch. D. 324; *Sayers v. Collyer*, 28 Ch. D. 103; see *German v. Chapman*, 7 Ch. D. 271; *Knight v. Simmonds*, 1896, 2 Ch. 294; *Rowell v. Satchell*, 1903, 2 Ch. 212; *Osborne v. Bradley*, 1903, 2 Ch. 446; *Elliston v. Reacher*, 1908, 2 Ch. 374, 392, 665.

Title to
benefit of
restrictive
covenant.

sideration in assessing the amount of damages recoverable (u). But after long acquiescence by the covenantee in a breach of the covenant, a waiver of the covenant will be presumed (x). If land be sold together with the benefit of any covenant or contract restricting the use of any adjoining land, the vendor must, of course, prove his title to this advantage, as in the case of his selling any easement or other legal right exercisable over any land of which he is not the owner. And if a man sell land together with the advantage of some restriction to be newly created as to the use of other land of his own, he must show a good title to the latter piece of land as well as the former (y).

§ 13.—*Investigation of Title in View of a Mortgage.*

Investigation
of title in
view of
mortgage.

A few words may be added on the investigation of title in view of taking a mortgage of land. When it is proposed to obtain a loan of money on the security of a mortgage of land, the title is usually investigated even more strictly than on a sale (z): but the parties stand in a very different position from that of a vendor and purchaser. In the first place, it is not usual for persons proposing to lend money on a mortgage of lands to bind themselves by contract to make the loan (a). They are, therefore, generally in a position to exact any evidence of title which they may choose to demand, as they can at any time decline to proceed with the transaction, if the title produced is in any respect insufficient. They should, however, before commencing the investigation of the title to the lands proposed to be mortgaged or incurring any other trouble or expense in the matter, be careful to stipulate expressly that the mortgagor shall

(u) See *Bedford v. Trustees of British Museum*, 2 My. & K. 552; *Sayers v. Collyer*, 28 Ch. D. 103.

(x) *Hepworth v. Pickles*, 1900, 1 Ch. 108.

(y) Above, p. 434, and n. (f).

(z) Wms. Real Prop. 449, 13th ed.; 596, 21st ed.

(a) Davidson, *Prec. Conv.* vol. ii. pt. i. p. 104, n. (a), 4th ed.

pay all their costs and expenses of and incident to the transaction proposed in any event, whether they choose to make the loan or not. For although the regular course of practice, where a mortgage is completed, is for all costs incurred by the mortgagee in investigating the title, valuing the land, and otherwise preparing for the loan, to be paid by the mortgagor (*b*), yet where the parties are not bound to each other by any contract, there is no obligation on the mortgagor to discharge such costs, if the loan be not made (*c*). Unless, therefore, an intending mortgagee make the above-mentioned express stipulation, he runs the risk of being out of pocket by the transaction, if he should be obliged to decline the loan on account of some defect in the title. If an agreement should be made that one shall lend and another borrow money on mortgage of some particular land, it is not an implied term of the contract that the borrower shall prove his title to the land for the last sixty or forty years, or any other particular period; as the transaction of borrowing implies that securities of every degree of safety may be made available, any risk run with regard to the title being compensated by the terms agreed upon as to the rate of interest to be paid or otherwise (*d*). It is not, therefore, a breach of such a contract for the borrower to fail to show a good marketable title to the land: although the contract would appear to be broken if the borrower should fail to produce any property of his corresponding with that described in the contract.

(*b*) If the loan be made without such costs being paid, they cannot be added as mortgagee's costs to the security: but they are recoverable by the mortgagee from the mortgagor personally under an implied contract of indemnity: *Walen v. Carr*, 1902, 1 Ch. 860.

(*c*) *Rigley v. Daykin*, 2 Y. & J. 83; *Wilkinson v. Grant*, 18 C. B. 319; *Melbourne v. Cottrell*, 5 W. R. 884, 29 L. T. O. S. 293. But

where the Court sanctioned a mortgage of an infant's estate, and the matter went off without the proposed mortgagee's default, he was allowed his costs of investigating the title out of the infant's estate: *Craggs v. Gray*, 35 Beav. 166.

(*d*) *Melbourne v. Cottrell*, ubi sup.; and see *National Provincial Bank of England v. Games*, 31 Ch. D. 582.

The Court will not, however, specifically enforce a contract to lend money on mortgage of some particular property at suit of either the borrower or the lender (*e*); unless the money should have been first actually advanced by the lender on the borrower's promise to give the particular security (*f*): but the person aggrieved by a breach of such a contract may recover damages proportionate to the loss he has sustained (*g*). It follows that, if an intending mortgagee of land should contemplate entering into a contract to make the loan, he should expressly stipulate that the borrower shall first show a good marketable title to the land to the satisfaction of the lender's counsel, that the lender shall be at liberty to rescind the contract if his counsel shall not accept the title, and that the borrower shall pay all the lender's costs (*h*) and expenses of and incident to the transaction in any event, whether the loan be made or not. If it be intended that the lender shall recover any compensation beyond expenses out of pocket in the event of the loan not being made, such as interest for his money whilst lying idle, this must be the subject of express stipulation (*i*).

What title should be required on behalf of a mortgagee.

In advising on title on behalf of an intending mortgagee, it must be remembered that the object of the transaction proposed is very different from that of a

(*c*) *Rogers v. Challis*, 27 Beav. 175; *Sichel v. Mosenthal*, 30 Beav. 371; *South African Territories, Ltd. v. Wallington*, 1897, 1 Q. B. 692, 1898, A. C. 309.

(*f*) *Ashton v. Corrigan*, L. R. 13 Eq. 76; *Hermann v. Hodges*, L. R. 16 Eq. 18; *Taylor v. Eckersley*, 2 Ch. D. 302.

(*g*) See *Western Wagon, &c. Co. v. West*, 1892, 1 Ch. 271, 277; *South African Territories, Ltd. v. Wallington*, ubi sup. Where the borrower under such a contract breaks off the transaction without

reason, the lender can recover his solicitor's costs as damages: *Carter v. Merrion*, 32 L. T. N. S. 663.

(*h*) Where an intending borrower agreed to pay the lender's reasonable costs in case the loan went off, it was held that this did not include the commission charged by the lender's bankers for withdrawing his money from deposit: *Re Blakesley and Berwick*, 32 Beav. 379.

(*i*) *Sweetland v. Smith*, 3 Tyrw. 491.

sale. Purchasers generally buy land with the view of occupying or enjoying it; they seldom buy it for immediate re-sale. But the object of a mortgagee is simply to obtain good security for the repayment of his money, whenever he may desire to call it in. And, assuming that the valuation of the land is satisfactory, what conduces most to this end is that he should be able at any time to exercise effectually his best and most convenient remedy, which is his power of sale. While purchasers, therefore, so long as they can obtain a good holding title, are often willing to waive defects of title which will be cured by lapse of time or may be covered by special conditions on a re-sale, a mortgagee will always desire to get a good marketable title; for he contemplates the possibility of having recourse to a forced sale, when special conditions, in spite of the avidity with which they are usually swallowed at the auction mart, may be depreciatory. The conveyancer advising an intending mortgagee should therefore see that his client will obtain a good marketable title, that is, a title under which the property can be put up for sale without any special conditions restricting the purchaser's rights, or which an unwilling purchaser under an open contract would be obliged to accept (*k*). As we have seen (*l*), an intending mortgagee is not usually bound, as a purchaser very commonly is, by any contract requiring him to accept less than a good marketable title. If it should be proposed that an intending mortgagee should accept a title less than this, the question, whether he may reasonably concede what is asked, should be determined by considering whether the suggested concession will practically hamper the exercise of his power of sale. And as a mortgagee on completion gets only a parchment security, and does not,

Good marketable title.

(*k*) *Pyrie v. Waddingham*, 10 Hare, 1, 8.

(*l*) Above, p. 498.

like a vendor, enter into possession of the land, there is the more reason for seeing that the evidence of the mortgagor's title is in every respect complete. The title deeds especially should be examined with most particular care (*m*); for frauds and forgeries have been far more frequently effected in connection with the mortgage of land, where there is no transfer of the actual possession, than upon sale. As regards the evidence both of any facts material to the title and the identity of the premises, a mortgagee will, as a rule, require strict proof according to conveyancing practice (*n*). We have seen (*o*) that purchasers, who have to pay out of their own pockets the expense of procuring evidence not in the vendor's possession, often content themselves with informal evidence, or sometimes waive proof of such matters, especially where the vendor and his predecessors have long been known as the owners of the land. But an intending mortgagee cannot safely dispense with good evidence in these respects. With these differences, the investigation of title in view of a mortgage of land is carried out in like manner as upon a sale.

Transfer of
mortgage.

Investigation of title prior to taking a transfer of a mortgage is, of course, governed by the same considerations as arise on a proposal for a new mortgage. On the transfer of a mortgage, made without the privity of the mortgagor, the transferee takes subject to the state of account then existing between the mortgagor and the mortgagee (*p*). And if the transferee omit to give to the mortgagor notice of the transfer, he will not be entitled to hold his legal estate in the mortgaged property as security for any sums of money

(*m*) See above, pp. 143, 144.

(*n*) Above, pp. 131 *sq.*, 143.

(*o*) Above, p. 142.

(*p*) *Matthews v. Wallwyn*, 4

Ves. 118; cf. *Bickerton v. Walker*, 31 Ch. D. 151; *Bateman v. Hunt*, 1904, 2 K. B. 530.

paid since the transfer by the mortgagor to the original mortgagee on account either of interest or principal (*q*). A transfer of a mortgage cannot therefore be safely taken from the mortgagee alone without first inquiring of the mortgagor as to the state of the mortgage debt and the interest thereon and obtaining a favourable reply, and giving notice of the transfer to the mortgagor. In practice the mortgagor is always made a party to a transfer of the mortgage whenever his concurrence can be procured (*r*).

(*q*) *Williams v. Sorrell*, 4 Ves. 213; see *Dixon v. Winch*, 1900, 389; *Re Lord Southampton's Estate*, 16 Ch. D. 178, 185, 187; 1 Ch. 736.
 (*r*) See Davidson, *Prec. Conv.*, *Turner v. Smith*, 1901, 1 Ch. vol. ii. part ii. p. 264, 4th ed.

CHAPTER XI.

OF THE EFFECT OF THE CONTRACT PENDING
COMPLETION.

- § 1. Of the Rights and Liabilities of the Parties
pending Completion in respect of the
Property sold.
- § 2. Of the Transfer pending Completion of
the Rights and Liabilities under the
Contract.

§ 1.—*Of the Rights and Liabilities of the Parties pending
Completion in respect of the Property sold.*

THE effect of the contract upon the position of the parties has already been shortly stated (*a*). Unlike the case of goods, the legal estate in land can never pass by the contract itself; a conveyance distinct from the contract is always required (*b*). But there is a considerable likeness between the effect of the unconditional sale of a particular chattel at law and the effect in equity of the sale of lands. For in equity, subject to the vendor's duty of showing a good title, to his lien for the price, and to his right to the rents and profits up to the proper time for completion, the whole estate contracted for in the lands sold is considered as belonging to the purchaser as from the date of the contract for sale (*c*). As from that date, therefore, the vendor is

(*a*) Above, pp. 49, 50.

(*b*) Wms. Pers. Prop. 65, 72, 50.

(*c*) Above, pp. 49, and n. (*b*),

16th ed.

bound to use the same care in preserving or managing the property sold as a trustee must use with regard to the property subject to his trust (*d*). As from that date the property stands at the purchaser's risk as regards all losses caused without the vendor's fault, as through tempest, flood, fire, or fall in prices (*e*); and the purchaser takes the benefit of all improvements casually happening thereto, such as the death of the tenant for life on the purchase of the reversion (*f*). And as from that date in equity the lands sold are the purchaser's lands, and, if freehold or copyhold, are the purchaser's real estate (*g*), and are in the vendor's hands converted into personalty (*h*). But this passing of the equitable estate in the lands sold to the purchaser is subject to the condition that the contract be such as can be specifically enforced in equity; and if this condition fail, as by the want of a good title on the vendor's part, the lands remain the vendor's property in equity as well as at law (*i*). It is, of course, by reason of the doctrine that, as regards the consequences of any act contemplated by a binding agreement, equity regards what ought to be done as actually accomplished (*k*), that in the interval between contract and conveyance the

(*d*) Above, p. 50 and n. (*k*).

(*e*) *Poole v. Shergold*, 1 Cox, 273; *Paine v. Moller*, 6 Ves. 349, 352; *Harford v. Purrier*, 1 Madd. 532, 539; *Robertson v. Skelton*, 12 Beav. 260; Sug. V. & P. 291; *Rayner v. Preston*, 18 Ch. D. 1; *Castellain v. Preston*, 11 Q. B. D. 380.

(*f*) *White v. Notts*, 1 P. W. 61, 62; *Ex parte Manning*, 2 P. W. 110; Sug. V. & P. 291, 292; Dart, V. & P. 248, n. (*u*), 649, 5th ed.; 286, n. (*u*), 732, 6th ed.; 672, 7th ed.

(*g*) Thus, the lands sold will pass under a devise of all the purchaser's lands or real estate: *Greenhill v. Greenhill*, Prec. Ch. 320; *Atcherley v. Vernon*, 10 Mod.

518, 526—529; *Potter v. Potter*, 1 Ves. sen. 437; *Copel v. Girdler*, 9 Ves. 509, 510; *Marston v. Rowd. Fox*, 8 A. & E. 14, 63; Sug. V. & P. 175, 183 *sq.*; *Re Kensington*, 1902, 1 Ch. 203; *Re Taylor*, 1910, 1 K. B. 562, 571, 572, 580.

(*h*) *A.-G. v. Bromming*, 8 H. L. C. 243, 255, 265.

(*i*) *Broome v. Monck*, 10 Ves. 597; Sug. V. & P. 191, 193; *Lysaght v. Edwards*, 2 Ch. D. 499, 506—508; *Re Thomas*, 34 Ch. D. 166; *Ridout v. Fowler*, 1904, 1 Ch. 658, 2 Ch. 93; see above, pp. 456, 458.

(*k*) *Re Cary - Elwes' Contract*, 1906, 2 Ch. 143, 149; Wms. Real Prop. 187, 21st ed.

property belongs in equity to the purchaser, for whom the vendor is constructively a trustee. This trusteeship is not absolute, for the vendor has a personal and substantial interest in the property, which he is entitled to protect (*l*). As a trustee for the purchaser, the vendor is bound, as we have seen, to take proper care of the property. His beneficial interest in the land sold consists, first, in his lien thereon for the price, involving the right to hold possession of the land until the whole purchase money be paid (*m*); and secondly, in the right to take for his own use the rents and profits up to the proper time for completion, that is, the time fixed by the contract for completion or, under an open contract, the time when a good title shall have been shown (*n*). And the vendor lies under the obligation, correlative to the latter benefit, of discharging all outgoings due in respect of the property sold up to the same time (*o*). We will first consider the rights of the purchaser, and the vendor's consequent liability to him, and will then examine the vendor's rights.

We have seen (*p*) that from the date of the contract the purchaser is in equity the owner of the property sold, though not absolutely, but subject to the condition that the contract be specifically enforceable. The lands sold are in equity his lands; he can sell, charge or devise them; if of inheritance, they are his real estate descendible to his heir, and are applicable as such for payment of his debts (*q*). He therefore bears all

(*l*) *Shaw v. Foster*, L. R. 5 H. L. 321, 338; *Lysaght v. Edwards*, 2 Ch. D. 499, 506; *Rayner v. Preston*, 18 Ch. D. 1, 6; *Re Stucley*, 1906, 1 Ch. 67, 78.

(*m*) *Acland v. Gaisford*, 2 Madd. 28, 32; *Phillips v. Silvester*, L. R. 8 Ch. 173, 176—178. It should be noted that the vendor's equitable lien on the land sold for unpaid purchase money

continues after he has let the purchaser into possession or executed a conveyance to him, without receiving payment of the whole or part of the price; see below, Chap. XVIII. § 1.

(*n*) Above, pp. 26, 46, 50.

(*o*) Above, p. 50.

(*p*) Above, p. 505, and notes (*e*), (*f*), (*g*).

(*q*) *Paine v. Meller*, 6 Ves. 349,

losses and takes the advantage of all additions or improvements which casually happen or are made to the property after that date. Thus, if after the signing of the contract, but before its completion, a house or any other building erected on the land sold be accidentally destroyed by fire, the purchaser remains none the less liable to perform the contract without any abatement of the price, and this liability may be enforced, not only at law but by a decree for specific performance in equity (*r*). The same rule is applicable if the lands sold be devastated by tempest, earthquake, or volcanic eruption, or be flooded, or suffer an irruption of the sea (*s*), or lose in value by reason of a fall in prices (*t*). On the other hand, the purchaser takes the advantage of all improvements effected in the property sold through extraneous causes, such as any exertion of natural forces, the dropping of lives on sale of a reversion or remainder (*u*), the death of the incumbent on the purchase of an advowson (*x*), a general rise in the price of land, or the making of any road, railway, or other public work or undertaking, through or near the property (*y*). And it appears that if the vendor himself make permanent improvements, as by building after the contract, the purchaser will be entitled to the benefit

352; *Seton v. Slade*, 7 Ves. 265, 274; *Broome v. Monck*, 10 Ves. 597, 614, 620, 621.

(*r*) *Prine v. Meller*, 6 Ves. 349, 352; *Rayner v. Preston*, 18 Ch. D. 1. This is undoubtedly so in the case of an absolute sale; but if persons contract on such terms that the continued existence of the object of the contract is a condition precedent to the performance of the agreement, they are discharged from their respective obligations by the destruction of the object without their fault: *Taylor v. Caldwell*, 3 B. & S. 826; and see *Counter v. Macpherson*, 5 Moore,

P. C. 83, 104, 105; below, Chap. XVIII. § 1.

(*s*) Sug. V. & P. 291, 293, 294; Jessel, M. R., *Lysaght v. Edwards*, 2 Ch. D. 499, 507. The case is parallel to that of the absolute destruction before delivery and payment of the price of a particular chattel so sold as to pass the property to the purchaser: see *Taylor v. Caldwell*, 3 B. & S. 826, 833, 837.

(*t*) *Poole v. Shergold*, 1 Cox, 273.

(*u*) Above, p. 505.

(*x*) Above, p. 443.

(*y*) *Paine v. Meller*, 6 Ves. 349, 352.

thereof without further payment (z). The purchaser is also entitled in equity to all things which belong to the owner of the inheritance as against a tenant for life impeachable for waste, such as timber trees blown or cut down (a), or minerals gotten after the contract either by a trespasser or by the vendor otherwise than in working, up to the proper time for completion, mines or quarries open at the time of sale (b).

Destruction
by fire pend-
ing comple-
tion of a
house insured
by the vendor.

In connection with the destruction of a house sold by fire occurring before the completion of the contract, it should be mentioned that, where the house has been insured by the vendor, the benefit of the policy of insurance will not pass to the purchaser under the contract for sale of the house, unless expressly assigned to him; for the policy of insurance was altogether a collateral contract (c). And it should be especially noted that the benefit of a policy of insurance against fire is not, as a rule, assignable without the insurer's consent, for such policies usually take the form of a contract to indemnify the insured personally or his representatives in law, but not his assigns otherwise than by will (d). A vendor of

(z) *Clare Hall v. Harding*, 6 Hare, 273, 296; *Monro v. Taylor*, 8 Hare, 51, 60; Sug. V. & P. 304; 1 Dart, V. & P. 248, n. (u), 253, 5th ed.; 286, n. (u), 291, 6th ed.; 294, 7th ed.

(a) *Poole v. Shergold*, 1 Cox, 273; *Magenis v. Fallon*, 2 Moll. 561, 591.

(b) See *Nelson v. Bridges*, 2 Beav. 239; *Brown v. Dibbs*, 25 W. R. 776, 37 L. T. N. S. 171; *Leppington v. Freeman*, 40 W. R. 348, 66 L. T. N. S. 357. As to the damages recoverable where minerals have been wrongfully gotten by wilful trespass or under a *bonâ fide* claim of title, see *Jegon v. Vivian*, L. R. 6 Ch. 742; *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25; *Bulli, &c. Co. v. Osborne*, 1899, A. C. 351.

(c) *Paine v. Meller*, 6 Ves. 349, 352, 353; *Poole v. Adams*, 12 W. R. 683; *Rayner v. Preston*, 14 Ch. D. 297, 18 Ch. D. 1. The vendor remains entitled to recover the insurance money until the contract is executed by payment of the purchase money: *Collingridge v. Royal Exchange Assurance Corpn.*, 3 Q. B. D. 173.

(d) *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Saddlers' Co. v. Badcock*, 2 Atk. 554; *Darrell v. Tibbits*, 5 Q. B. D. 560; *Castellain v. Preston*, 11 Q. B. D. 380; *West of England, &c. Co. v. Isaacs*, 1897, 1 Q. B. 226; *Phoenix Assurance Co. v. Spooner*, 1905, 2 K. B. 753; *Bunyon on Fire Insurance*, 11, 182, 303, 304; *Porter on Insurance*, 300, 2nd ed. There

land should, therefore, be very careful neither to assign to the purchaser the benefit of any existing contract of insurance against fire of any building thereon, nor to agree to hold any such policy on trust for the purchaser, except subject to the consent of the insuring office (*e*). For if the vendor make such an assignment or agreement without the consent of the office, and pending completion the house be burnt down, and he receive the insurance money and hand it over to the purchaser, or lay it out in rebuilding at the purchaser's request, he will be liable on receiving the full purchase money at the completion of the sale, to refund to the insurance office the amount paid by them (*f*); but it does not appear that he will have any cause of action to recover anything from the purchaser. And if the vendor, without having entered into any agreement with the purchaser, apply the money received under a policy of insurance against fire of a house burnt down pending completion in rebuilding or reinstating the house, it does not appear that he will be entitled to claim any increase of the purchase money on that account (*g*), and he will be equally liable to repay the amount of the insurance money to the insuring office on receiving the full price of the property sold (*h*). By a provision of

is nothing in the nature of a contract of fire insurance which makes it impossible to assign over the benefit thereof; policies of marine insurance, which are equally contracts of indemnity, have always been made in favour of the insured and his assigns and have been assignable accordingly; although, of course, at common law they were only indirectly assignable by means of a power of attorney: see *Arnould on Marine Insurance*, i. 107, 112, 231, 234, 6th ed.; *Wms. Pers. Prop.* 33, 34 and n. (*d*), 282, 283, 16th ed.

(*e*) For a form of stipulation appropriate to the case, see 1 Key

& Elph. Prec. Conv. 299, 8th ed.

(*f*) *Castellain v. Preston*, 11 Q. B. D. 380; *Phoenix Assurance Co. v. Spooner*, 1905, 2 K. B. 753.

(*g*) Above, p. 507.

(*h*) *Castellain v. Preston*; *Phoenix Assurance Co. v. Spooner*, ubi sup. The principle is that a contract of insurance is a contract of indemnity, and the insurer, having made good the loss, is entitled by subrogation to the rights of the insured to the benefit of any compensation which the insured has a legal claim to exact from other sources. See also *West of England Fire Insurance Co. v. Isaacs*, 1897, 1 Q. B. 226. It is

the old Metropolitan Building Act, still remaining unrepealed, insurance offices are required, at the instance of any person interested in or entitled unto any houses or buildings damaged by fire, to cause the insurance money to be laid out in rebuilding or reinstating the same, unless within sixty days after the claim is adjusted the parties claiming the insurance money give security that the same shall be so laid out, or the money be disposed of among the contending parties to the satisfaction of the office (*i*). It has been held that the operation of this provision is general, and is not confined to houses or buildings within the limits of the metropolis (*k*), but the correctness of this decision has been questioned in the House of Lords (*l*). It seems very doubtful whether this enactment enables any person who has an interest in the building damaged, but has no independent claim to have the insurance money applied in reinstatement, to require the office to lay out the insurance money in rebuilding. Thus, where a lessee under covenant with his lessor to insure in their joint names to three-fourths of the value of the premises and to apply the insurance money in reinstatement, effected such insurance, but subsequently improved the premises and effected a further insurance

not, however, the usual policy of insurance offices to stand upon their strict legal rights where such a course would involve hardship to the insured: see Davidson's Concise Precedents, 117, 118, n. (*b*), 18th ed.

(*i*) Stat. 14 Geo. III. c. 78, s. 83. The person interested, desiring the insurance money to be applied in reinstatement must make a distinct request to that effect to the insurance office; otherwise the office may pay the money to the person who effected the insurance. The office is the proper party to rebuild, and a person interested, not being the

person who effected the insurance, cannot after he has himself rebuilt claim the insurance money by virtue of this enactment: *Simpson v. Scottish Union Insurance Co.*, 1 H. & M. 618.

(*k*) *Ex parte Gorely*, 4 De G. J. & S. 477.

(*l*) *Westminster Fire Office v. Glasgow, &c. Socy.*, 13 App. Cas. 699, 716. The rule in *Ex parte Gorely* was followed by Swinfen Eady, J., in *Re Quicke's Trusts*, 1908, 1 Ch. 887, 893 and n. (1), but apparently without the opinion expressed in the House of Lords having been cited to him.

in his own name, it was held that the money payable under such further insurance must be laid out at the lessor's request in reinstating the property (*m*). But it has been doubted by Lord Selborne in the House of Lords whether this enactment gives a mortgagor or subsequent incumbrancer any claim to require the money paid under an insurance made by a mortgagee to be applied in reinstatement (*n*), and the doubt apparently extends to question the claim of a mortgagee to require reinstatement, where the insurance was effected by the mortgagor before the mortgage, and the mortgagor has not expressly agreed to apply the insurance money in reinstatement (*o*). If this doubt be well founded, it does not appear that where a house sold has been insured by the vendor and burnt down pending completion of the contract, the purchaser can under the above-mentioned enactment require the insurance money to be laid out in rebuilding, unless the vendor has expressly agreed to give him the benefit of the insurance or to lay out the money in reinstatement (*p*). It follows

(*m*) *Ex parte Gorely*, 4 De G. J. & S. 477.

(*n*) *Westminster Fire Office v. Glasgow, &c. Socy.*, 13 App. Cas. 699, 714.

(*o*) It is submitted that, independently of the enactment in question, a mortgagee has no right or equity to require any money received under an insurance effected by the mortgagor prior to the mortgage to be applied in making good the damage done, except where the mort-

gagor has contracted that the money shall be so applied and the benefit of that contract in effect forms part of the mortgagee's security, as where a lessee bound by covenant with the lessor to insure and apply the insurance money in reinstatement, insures accordingly and afterwards mortgages the demised premises: see *Garden v. Ingram*, 23 L. J. Ch. 478; *Lees v. Whiteley*, L. R. 2 Eq. 143; *Wms. Conv. Stat.* 156—159.

(*p*) The contrary is maintained in 1 Dart, V. & P. 197, 6th ed. (cf. 193, 7th ed.), written, however, before the case of *Westminster Fire Office v. Glasgow, &c. Socy.* It is there suggested that, unless the vendor expressly stipulate that, as regards all insurable loss or damage, the property shall be at the sole risk of the purchaser, as from the date of the contract, the vendor is liable to have the insurance money applied against his will at the purchaser's request in rebuilding and yet to refund the amount of the insurance money to the office on completion. It is, however, submitted that, even if the above enactment should be held to enable a person, interested in the building burnt but having no independent

Purchaser
should him-
self insure
against fire.

that where the property sold comprises valuable buildings, the purchaser should himself insure against fire as from the date of the contract for sale, unless it be arranged with the consent of the office that he shall have the benefit of the existing insurance.

Vendor's
duty to take
care of the
property sold.

As the result of the purchaser's equitable ownership of the property sold and the vendor's consequent trusteeship for the purchaser, the vendor is bound, while he remains in possession of the property sold, to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale (*q*). He must use the same care that a trustee ought to use with regard to the trust property, of which he is in possession; that is to say, he must take the same care as a prudent owner would take of his own property (*r*). Thus he must cultivate the lands, if in hand, in a husbandlike manner (*s*), keep the property in a reasonable state of repair (*t*) and take proper precautions against injury to the lands by trespassers (*u*); and if he fail in any of these duties, the purchaser will

claim on the insurance money or its application, to require the office to lay out the money in reinstatement, in such case there would in effect be a statutory modification of the contract of insurance to the prejudice of the insurers. They would be under a statutory duty to lay out the money in rebuilding, which would indeed discharge them from the obligation of paying the vendor. But as the vendor, having previously parted with his beneficial interest in the property insured, would derive no benefit from the reinstatement, it is submitted that the principle of subrogation would not apply, and the vendor could not be called upon to refund on completion a sum of money which was neither paid to him nor laid out on *his* property: see above, p. 506; Davidson's Concise Precedents, 117, n. (*b*), 18th ed. (but the present writer doubts the safety to the vendor of the clause there suggested). It is submitted that there is no necessity for the vendor to make the stipulation suggested as above in Dart, V. & P., 6th ed.

(*q*) Above, p. 50, and n. (*k*).

(*r*) *Wilson v. Clapham*, 1 J. & W. 36, 38; *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 537.

(*s*) *Foster v. Deacon*, 3 Madd. 394.

(*t*) *Binks v. Rokeby*, 2 Swanst. 222, 226; *Lord v. Stephens*, 1

Y. & C. 222; *Townsend v. Champenour*, 3 Y. & C. 505, 508; *Regent's Canal Co. v. Ware*, 23 Beav. 575, 588; *Royal Bristol, &c. Bdg. Socy. v. Bomash*, 35 Ch. D. 390, 397, 398.

(*u*) *Clarke v. Ramuz*, 1891, 2 Q. B. 456.

be entitled to an allowance by way of compensation to be deducted from the purchase money (*x*), or in case of his completing the purchase in ignorance of the vendor's breach of duty he may sue the vendor for damages for the loss sustained thereby (*y*). As a rule, the vendor is bound to execute at his own expense such repairs as are necessary in order to preserve the property sold from deterioration until the proper time for completion of the contract (*z*). We have seen (*a*), that this time is, under an open contract, the time at which a good title shall have been shown; and the vendor's obligation of keeping the property in a good state of preservation up to that time at his own expense appears to fall on him because until then he remains entitled as owner to the ordinary profits and must discharge the current outgoings (*b*). When the contract has fixed a particular day for completion, and completion is delayed beyond that time by reason of the title not having been made out, the vendor is bound, as a rule, to preserve the property from deterioration at his own expense until the time when the purchaser may reasonably take possession, that is, until a good title be shown (*c*). The vendor is not, however, bound to improve the property, and he should be careful not to expend money on improvements, as he will have no right to recover any sums so expended from the purchaser, unless the purchaser should have authorised such expenditure (*d*). If the state of the property sold be such that an extraordinary outlay, beyond what may properly be regarded as current out-

Vendor not bound to improve the property.

(*x*) See note (*t*), above, p. 512.

(*y*) *Clucke v. Romer*, 1891, 2 Q. B. 456.

(*z*) See note (*t*) above, p. 512; *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 532, 534, 539.

(*a*) Above, pp. 26, 46.

(*b*) Above, pp. 49, 50. An absolute trustee would, of course, be entitled to be reimbursed all moneys properly expended in preserving the trust property, and would not

be bound to pay for any repairs out of his own pocket, if he had no trust money in hand available for the purpose: see *Brady v. Brown*, 2 Y. & C. C. C. 181, 191, 192; *Fazakerley v. Culshaw*, 19 W. R. 793; *Re De Teissier's Settled Estates*, 1893, 1 Ch. 153; *Re Montagu*, 1897, 2 Ch. 8.

(*c*) *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 532, 539.

(*d*) Above, p. 507.

goings, should be necessary to be made in lasting repairs in order to preserve the property from deterioration, it appears that the vendor ought to be allowed his expenses properly incurred for such purpose (*e*). If by reason of the purchaser's default in completing the contract the property remain in the vendor's possession after the time when the purchaser might reasonably have taken possession, the purchaser will not be entitled to any allowance or compensation for any deterioration which the property may have suffered since that time (*f*). If the property sold be let to yearly or other tenants, the vendor must manage the same as a prudent owner would in the interval between the making of the contract and its completion, and see that the tenants duly perform their obligations (*g*). He should not allow the rents to fall into arrear (*h*): but he may reduce them, where a prudent owner would find it necessary to do so (*i*). If any tenancy of lands usually let determine during the interval in question, the vendor ought to notify the vacancy so occurring to the purchaser, and unless the purchaser should express a wish that the lands should remain unlet and promise to indemnify the vendor against loss on this account in case of the purchase going off, the vendor ought to take steps to re-let the lands. And the vendor should do this, whether the tenancy expired by effluxion of time or by reason of a notice to quit served by the vendor at the purchaser's request (*k*). So the vendor should not, as a rule, determine any existing tenancy, unless the purchaser desire it (*l*). When a sale of land is not actually com-

(*e*) *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 532; *Phillips v. Silvester*, L. R. 8 Ch. 173, 176.

(*f*) *Binks v. Rokeby*, 2 Swanst. 222, 226; *Minchin v. Nance*, 4 Beav. 332.

(*g*) *Foster v. Deacon*, 3 Madd. 394, 395.

(*h*) *Acland v. Gaisford*, 2 Madd. 28, 32; *Wilson v. Clapham*, 1 J. &

W. 36, 38; *Plews v. Samuel*, 1904, 1 Ch. 464.

(*i*) *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 537.

(*k*) *Egmont v. Smith*, 6 Ch. D. 469; and see *Bennett v. Stone*, 1902, 1 Ch. 226, 237, affirmed, 1903, 1 Ch. 509.

(*l*) *Raffety v. Schofield*, 1897, 1 Ch. 937, 944, 945.

pleted, under an open contract at the proper time for completion (*m*), or otherwise on the day fixed for completion (*n*), the vendor is entitled to remain in possession until the sale is actually completed by payment of the purchase money (*o*), whether the delay in completion be due to the state of the title or to the purchaser's default in payment; unless, of course, the contract be that the purchaser shall have possession on a day named irrespectively of the completion of the purchase (*p*). But, as we have seen (*q*), when the purchase is not completed at the proper time or appointed day, the purchaser is entitled to the rents and profits, and is bound to pay interest on the purchase money, if he bought under an open contract, from the time when a good title was shown and verified (*r*); if he bought under a contract fixing a day for completion, but not expressly providing for payment of interest, from that day, where the delay is attributable to his own fault, and otherwise from the time when he took or might safely have taken possession; and if he bought under a contract to pay interest on failure *from any cause whatever* to complete on the appointed day, as from that day. In such cases, therefore, the vendor must account to the purchaser for the rents and profits received by him from the date when the purchaser so became entitled to them until the date of actual completion, and the amount so received must be deducted from the amount of purchase money and interest payable (*s*). In taking such account the vendor is, as a rule, chargeable only with the amount of the rents actually received by him or for his use (*t*):

Vendor entitled to retain possession until actual completion.

Vendor's liability to account for the rents.

(*m*) Above, pp. 26, 46.

(*n*) Above, p. 57.

(*o*) Above, p. 506.

p. See *Gedye v. Montrose*, 26 Beav. 15.

(*q*) Above, pp. 50, 60, 67, 68.

(*r*) See above, pp. 46, 50, 166, n. (*m*), 186, n. (*h*), where it is

respectfully maintained that the decision of Parker, J., in *Halkett v. Dudley*, 1907, 1 Ch. 590, 606, was erroneous.

(*s*) See *M'Namara v. Williams*, 6 Ves. 143; *Pleves v. Samuel*, 1904, 1 Ch. 161.

(*t*) *Sherwin v. Shakspear*, 5 De G. M. & G. 517; Seton on Judg-

but he may in a special case be chargeable with the amount which, but for his wilful default, he might have received, as where he has allowed the rents to fall into arrear (*u*), or neglected to let the land (*x*), or has wantonly abandoned the property sold (*y*).

The vendor's rights.

As we have seen (*z*), the vendor's beneficial interest in the property sold between the making of the contract for sale and its completion consists, first, in his lien for the price, involving the right to hold possession of the land sold until the whole purchase money be paid; and secondly, in his right to take the ordinary rents and profits for his own use up to the proper time for completion. As to the first of these rights, the vendor is entitled to retain possession until the whole price is paid, unless the contract contain an express or implied stipulation that the purchaser shall have possession on a particular day without making such payment (*a*). And where the contract provides, as upon a sale by auction under the usual conditions (*b*), that the balance of the

ments, 2237, 6th ed.; *Bennett v. Stone*, 1902, 1 Ch. 226, affirmed, 1903, 1 Ch. 509.

(*u*) *Wilson v. Clapham*, 1 J. & W. 36; and see *Plews v. Samuel*, 1904, 1 Ch. 464, where rent was in arrear at the time of the sale and on the day fixed for completion, and the vendor was not allowed to appropriate moneys received by him from the tenant after that day (when the purchaser became entitled to the rents) in discharge of the arrears due before that day.

(*x*) *Bennett v. Stone*, 1902, 1 Ch. 226, 237.

(*y*) *Phillips v. Silvester*, L. R. 8 Ch. 173. In that case there certainly appears to have been such wanton negligence on the vendors' part as justified a decree against them on the footing of wilful default; but Lord Sel-

borne's remarks comparing the position of a vendor retaining possession until completion to that of a mortgagee in possession are directly opposed to the grounds of the decision in *Sherwin v. Shakspear*, 5 De G. M. & G. 517. It is submitted that these remarks of Lord Selborne were not necessary to his decision and are not good law, although, in other respects the decision appears to have been right. See 2 Dart, V. & P. 650, 651, 5th ed.; 733—735, 6th ed.; 673—675, 7th ed.; *Royal Bristol, &c. Bldg. Socy. v. Bomash*, 35 Ch. D. 390, 397, 398; *Clarke v. Ramuz*, 1891, 2 Q. B. 456.

(*z*) Above, p. 506.

(*a*) Above, p. 515; *Lysaght v. Edwards*, 2 Ch. D. 499, 506.

(*b*) Above, pp. 57, 67, 73, 74.

purchase money shall be paid on a particular day, and also that possession shall be taken by the purchaser on that day, it is held that such possession is intended as may be safely taken on the one hand and given on the other, and time is not, as a rule, of the essence of the contract; and as the purchaser is not bound to take possession until he can safely do so, that is, until a good title has been shown and verified, so the vendor cannot be compelled to deliver up possession without receiving payment of the whole price (*c*). If, however, the contract provide in such manner that time is either expressly or impliedly of the essence of the stipulation, that possession shall be given to the purchaser on a certain day, the purchaser is entitled to take possession on that day without paying the purchase money (*d*).

The profits which the vendor is entitled to take up to the proper time for completion are the ordinary casual profits arising in the course of the proper management of the estate—those which a tenant for life impeachable for waste would be entitled to take as against the remainderman (*e*). Thus, if the land sold be in hand, the

Vendor's
right to the
profits.

(*c*) *Talley v. Thomas*, L. R. 3 Ch. 61; *Phillips v. Silvester*, L. R. 8 Ch. 172, 176--178.

(*d*) *Gedye v. Montrose*, 26 Beav. 45.

(*e*) This comparison appears to be correct as a general rule. But it has been held, where a manor containing copyholds was sold by order of the Court of Chancery and copyhold tenants died or alienated before the date on which it was ordered that the purchaser should be let into possession, but the admissions so rendered necessary were not granted until after such date, that the fines upon such admissions were to be considered as having accrued before that date and were therefore payable to the vendor: *Garrick v. Camden*, 2 Cox, 231. And it has

been said that the same principle is applicable on a sale made out of Court: *Cuddon v. Tite*, 1 Giff. 395, where, however, the admission was taken before the date fixed for completion. It is submitted that the principle laid down in *Garrick v. Camden* is anomalous and ought not to be followed in a case where copyholders have died or alienated in the lifetime of a tenant for life of the manor, but the admissions consequent thereon have not been granted until after his death. For it is well settled that, as between copyholder and lord, no fine is due until admittance, and admittance is the act of the lord for the time being and is compellable by him: *Hobart and Hammond's case*, 4 Rep. 27b; *R. v. Hendon*, 2 T. R.

vendor is entitled to gather in the crops in the due and proper course of husbandry, and to dispose of them for his own benefit (*f*); and if the land be let, he is entitled to receive the rents as they become payable (*g*). And, usually by express contract (*h*), but, if not, under the Apportionment Act, 1870 (*i*), he is entitled to an apportioned part, up to the proper time for completion, of the current rents which will become payable after that time. So the vendor may work mines and quarries open at the time of sale (*k*). But he is not otherwise entitled to take any profit or benefit which forms part of the inheritance (*l*), and if he diminish the value of the inheritance by committing any voluntary waste, as by felling timber or working an unopened mine, the purchaser may claim compensation for the damage; or, if the waste be such as affects a material alteration in the property sold (for example, the felling of ornamental timber), the purchaser may repudiate the contract altogether (*m*). It appears that if the purchaser sue for specific performance of the contract, he may obtain an injunction restraining the vendor from the commission, pending completion, of any act tending to destroy or depreciate the inheritance of the land sold (*n*). Thus, on the sale of an advowson, if the church became

484; *Graham v. Sims*, 1 East, 632; *R. v. Wellesley*, 2 E. & B. 924; *Monckton v. Payne*, 1899, 2 Q. B. 603; 1 Wat. Cop. 317, 346, 347, 7th ed.; 1 Scriv. Cop. 111, 118, 283, 3rd ed.

(*f*) *Webster v. Donaldson*, 34 Beav. 451, 11 Jur. N. S. 404; it appears from the latter report that the stipulation that the growing crops should be included in the sale was held to be controlled by the provision that the purchaser should be entitled to the profits only as from the day fixed for completion.

(*g*) Above, p. 49, and n. (*h*); see *Plews v. Samuel*, 1904, 1 Ch.

464; above, p. 516, n. (*n*).

(*h*) Above, pp. 67, 74.

(*i*) Stat. 33 & 34 Vict. c. 35, s. 2.

(*k*) Above, p. 508, and n. (*b*).

(*l*) Above, p. 507.

(*m*) *Magennis v. Fallon*, 2 Moll. 561, 590; 1 Dart, V. & P. 248, 441, 5th ed.; 286, 507, 6th ed.; 290, 519, 520, 7th ed.

(*n*) See *Shrewsbury and Chester Rail. Co. v. Shrewsbury and Birmingham Rail. Co.*, 15 Jur. 548, 550; *Hadley v. London Bank of Scotland*, 3 De G. J. & S. 63, 70, 71; *London & County Bank v. Lewis*, 21 Ch. D. 490; Sug. V. & P. 228, 229.

vacant pending completion, the vendor may be restrained from presenting his own nominee to the living (o). And the vendor may be so restrained from selling the land to another, or from making any disposition of the legal estate therein to the prejudice of the purchaser (p). And on the same principle it would appear that the vendor may be restrained from wasting the property sold pending completion. But if the vendor dispute the fact that any contract for sale was made as alleged by the purchaser, the Court will not grant an injunction restraining the vendor from the exercise of any of his legal rights of ownership, unless the balance of convenience be obviously in favour of such a course (q).

If, as is frequently the case, there be a day fixed for completion and a contract to pay interest on failure to complete on that day, either from any cause whatever or from any other cause than the vendor's wilful default, and the vendor remain in possession after the time fixed for completion because a good title has not yet been shown, he ought, as we have seen (r), to cultivate the land sold, gather in the crops, and generally manage the property with the care of a prudent owner, but must account to the purchaser for the profits from the time fixed for completion until the date of actual completion, receiving instead interest on the purchase money. And where he is in actual occupation of any part of the property, he is chargeable with a fair occupation rent (s). During this period the out-

Vendor remaining in possession after the date fixed for completion.

(o) *Nicholson v. Knapp*, 9 Sim. 326; above, p. 443, and n. (l).

(p) *Eckliff v. Baldwin*, 16 Ves. 267; *Curtis v. Buckingham*, 3 V. & B. 168; *Spiller v. Spiller*, 5 Swanst. 556.

(q) *Turner v. Wright*, 1 Beav. 40; *Hadley v. London Bank of Scotland*, 3 De G. J. & S. 63.

(r) Above, pp. 512—516.

(s) *Dyer v. Hargrave*, 10 Ves.

505, 511; *Shervin v. Shakspear*, 5 De G. M. & G. 517, 532, 533, 538, 539; above, p. 51. It appears, however, that in an action for specific performance of a contract under which the vendor has so remained in actual occupation of the land sold, the order should direct an inquiry whether he has so occupied, and if so, that an annual value by way of rent

- Outgoings. goings, including the expenses of cultivation or management, fall upon the purchaser in the absence of express stipulation to the contrary, and the vendor is entitled to charge them against the purchaser in account (*t*). But if the vendor so remain in possession after he has shown such a title as the purchaser ought to accept, because of the purchaser's default in completing the contract, the
- Deterioration. vendor will not be liable for any subsequent deterioration of the property sold, though he must, of course, still account for the rents and profits until the actual completion of the sale (*u*). Where, however, completion is delayed by the purchaser's default, and the vendor is, on that account and to his own inconvenience, obliged to remain in actual occupation of any part of the property sold, the vendor will not be charged with any occupation rent therefor, and the purchaser is nevertheless liable to discharge the outgoings and to pay interest (*x*).

The vendor's duty to discharge the outgoings.

As we have seen (*y*), the vendor is, usually by express contract, but if not, by law, liable to discharge all out-

should be set thereon: *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 538, 539; Seton on Judgments, 2244, 6th ed. If this be omitted the vendor cannot be charged with an occupation rent under the usual order for an account of the rents and profits received by him or for his use (see above, p. 515); but where the land so occupied is in cultivation, he is chargeable with the proceeds of crops sold, less the expenses of realizing the same: *Bennett v. Stone*, 1902, 1 Ch. 226, 237, 238, affirmed, 1903, 1 Ch. 509.

(*t*) Above, pp. 506, 513; *Baysh v. Tagg*, 1900, 1 Ch. 231, 235; *Bennett v. Stone*, 1902, 1 Ch. 226, 1903, 1 Ch. 509. But the vendor cannot, under the account usually directed in actions for specific performance of rents and profits received by or for him (not upon

the footing of wilful default), charge the purchaser with losses incurred in carrying on farming business on a farm which was let at the date of the contract, but afterwards fell vacant and was occupied and farmed by the vendor: *Bennett v. Stone*, *ubi sup*.

(*u*) Above, pp. 513, 514; *Bennett v. Stone*, 1902, 1 Ch. 226, affirmed, 1903, 1 Ch. 509.

(*x*) *Dakin v. Cope*, 2 Russ. 170; *Leggott v. Metropolitan Rail. Co.*, L. R. 5 Ch. 716; also deciding that in such circumstances the purchaser cannot be charged with the vendor's losses, and the vendor is not liable to account for his profits in respect of a business carried on by him on the premises during such occupation thereof.

(*y*) Above, pp. 50, 67, 74, 506, 513.

goings payable in respect of or charged upon the property sold up till the time for completion of the purchase, and this obligation appears to be correlative to his right to enjoy the profits up till that time. He must therefore pay out of his own pocket all rates, taxes, tithe rent-charge and rent (whether quit-rent of freeholds or copyholds or rent of leaseholds sold), accruing due in respect of the property sold before the time for completion of the purchase, also all ordinary expenses of cultivating or managing the property and keeping the same in a due state of preservation, including the cost of ordinary repairs (z). The outgoings so payable by the vendor also include all sums of money which, before the time for completion, have become charged by statute upon the property sold or recoverable by distress or otherwise from the owner or occupier thereof for the time being (a); and this is the case whether the vendor have expressly contracted to discharge the outgoings or not (b). Thus, it has been held that the vendor must pay the expenses so charged on the property sold of paving, draining, or lighting the adjoining street under a local Improvement Act (c), the Public Health Act, 1875 (d), or the Private Street Works Act, 1892 (e), or of removing a dangerous structure under the Metropolitan Building Acts, 1855 and 1869 (f), or the London Building Acts, 1894 and 1898 (g), and the same law seems applicable to the

z. *Curcudus v. Sharp*, 20 Beav. 56; above, p. 513.

a. Above, pp. 50 and n. 11), 177, 178; *Stock v. Meakin*, 1900, 1 Ch. 683; *Stockdale v. Ascherberg*, 1904, 1 K. B. 447, 449.

(b) *Re Bettesworth and Richer*, 37 Ch. D. 535; *Barsht v. Tagg*, 1900, 1 Ch. 231, 234, 235.

(c) *Midgley v. Coppock*, 4 Ex. D. 309.

(d) *Re Bettesworth and Richer*, 37 Ch. D. 535; and see *Re Allen*

& *Driscoll's Contract*, 1904, 2 Ch. 226; *Millard v. Bulby, &c. Council*, 1905, 1 K. B. 60; *East Ham Council v. Aylett*, 1905, 2 K. B. 22.

(e) *Stock v. Meakin*, 1900, 1 Ch. 683; see *West Ham Corp. v. Sharp*, 1907, 1 K. B. 445, as to the powers of enforcing the charge given by this Act.

(f) *Tubbs v. Wynn*, 1897, 1 Q. B. 74.

(g) *Re Highett and Bird's Con-*

cost of abating a nuisance under the Public Health (London) Act, 1891 (*h*). Outgoings so charged by statute upon the land sold, whether by express words or impliedly by reason of their being recoverable by distress upon or other process of law against the land, are payable by the vendor if the statutory charge arise before the time for completion, even though the money secured by the charge should not become actually payable until after that date (*i*); and if the purchaser be obliged to pay the same after completion, he can recover the amount from the vendor either under an *express* stipulation in the contract for sale that the vendor shall discharge the outgoings up to the time fixed for completion (*k*) or under the covenant against incumbrances implied by statute (*l*) in the conveyance (*m*). Where such outgoings are not so charged by statute upon the property sold, but are merely recoverable by suing the owner thereof for the time being personally, it appears that the vendor ought to pay them if they fall due before the time for completion; but if he do not, and the purchaser be obliged to pay, the amount paid cannot be recovered from the vendor after completion under a covenant by him against incumbrances, as there is no liability affecting the land (*n*). It appears, however, that the purchaser is entitled to refuse to complete the contract until such outgoings are paid (*o*), and that he can recover any money which he is obliged to pay on this account after completion if the contract for sale contained an express stipulation that the vendor should discharge all out-

tract, 1902, 2 Ch. 214, 1903, 1 Ch. 287; as to which case, see above, p. 354.

(*h*) *Borsh* v. *Tagg*, 1900, 1 Ch. 231, 234, 235.

(*i*) As to the times when the charges given by the above-mentioned Acts attach, see the cases cited in the six preceding notes.

(*k*) *Midgley* v. *Coppock*, 4 Ex. D. 309; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*l*) Stat. 44 & 45 Vict. c. 41, s. 7.

(*m*) *Stock* v. *Meakin*, 1900, 1 Ch. 683.

(*n*) *Egg* v. *Blagney*, 21 Q. B. D. 107.

(*o*) See *Re Bettessworth and Richer*, 37 Ch. D. 535.

goings up to the time fixed for completion (*p*). If, however, the contract for sale contain no such express stipulation and be completed without the vendor discharging such outgoings, it is a question whether the purchaser, being subsequently obliged to pay them, have any remedy to recover the amount expended from the vendor (*q*).

As we have seen (*p*), contracts for the sale of land usually contain an express stipulation that the outgoings shall, if necessary, be apportioned between the vendor and purchaser up to the time fixed for completion. Where this is the case, all such outgoings as in their nature extend over and are attributable to a definite period of time, such as yearly taxes or half-yearly rates, should, it appears, be apportioned, even though they may not be apportionable by law (*s*). If the contract contain no such stipulation, such outgoings only can be apportioned between the parties as are apportionable by law (*t*).

Apportionment of outgoings.

(*p*) *Midgley v. Coppock*, 4 Ex. D. 309; *Tobbs v. Wynne*, 1897, 1 Q. B. 74.

(*q*) See *Eggs v. Blagney*, 21 Q. B. D. 107, where it seems that the vendor ought to have paid the amount claimed as outgoings; but the only point argued and decided was that the purchaser could not recover under the vendor's covenant against incumbrances. *Quære* whether, when land is sold under an open contract, the contract is so entirely merged in the conveyance as to prevent the purchaser from recovering after completion outgoings which the vendor ought to have, but has not paid, under the implied stipulation that the vendor shall discharge all outgoings up to the time for completion. This stipulation is not in any way carried out, nor is the object thereof performed by the conveyance of the property to the

purchaser; it would certainly survive if put into *express* words. Why, then, should it be extinguished merely because it is implied by law? See *Palmer v. Johnson*, 13 Q. B. D. 351, 356, 357, 359. In *Clarke v. Ramuz*, 1891, 2 Q. B. 456, an action was successfully maintained by a purchaser against a vendor after completion for a breach before completion of the vendor's implied duty to take proper care of the land sold: above, p. 512. And see below, Chap. XVIII. § 1.

(*r*) Above, pp. 67, 74.

(*s*) See *Lacey v. Gibson*, L. R. 1 Eq. 135, as to rent before the Apportionment Act, 1870 (it is presumed that a stipulation for apportionment was implied from the contract to *clear* the outgoings); *Midgley v. Coppock*, 4 Ex. D. 309, 313.

(*t*) *Midgley v. Coppock*, 4 Ex. D.

Purchaser
taking possession before
completion.

If the purchaser take possession of the property sold before completion of the contract, either in pursuance of a stipulation to that effect expressed or implied in the contract or with the vendor's consent given after the contract, he will, unless the contrary be expressly agreed, as from the time of his entry into possession, be entitled to take the ordinary rents and profits for his own use, and be liable to bear the outgoings and to pay interest on the purchase money (*u*). But as we have seen (*x*), where there is no express contract to pay interest, the purchaser may, in case of delay attributable to the vendor in completing the purchase, discharge himself from his liability to pay interest by appropriating his money to the purchase and giving the vendor notice of such appropriation. Where the purchaser is so let into possession before completion, the vendor, of course, retains his legal estate in the property sold until he parts with it by conveyance to the purchaser; but his only beneficial interest in the property sold is his equitable lien for the price, and in equity he holds his legal estate as security only for payment of the purchase money (*y*). In equity, the purchaser is the owner of the property, subject to the vendor's lien and to the condition that a good title shall be shown (*z*). It appears, therefore, that in such case the purchaser is, as a rule, entitled to exercise all ordinary acts of ownership over the property sold; for the very purpose of putting the purchaser into possession is to enable him to act as owner (*a*). But he may be restrained by injunction

309, 313. And see below, Chap. XII. § 4, as to apportionment of the outgoings.

(*u*) *Powell v. Morty*, 8 Ves. 146, 149; *Fludger v. Cocker*, 12 Ves. 25; *A.-G. v. Christ Church*, 13 Sim. 214; *Birch v. Joy*, 3 H. L. C. 565, 591; *Ballard v. Shutt*, 15 Ch. D. 122; *Fletcher v. Lancashire, &c. Rail. Co.*, 1902, 1 Ch.

901, 908.

(*x*) Above, pp. 51, 68.

(*y*) *Smith v. Hibbard*, 2 Dick. 730; *Ecclesiastical Commrs. v. Pinney*, 1899, 2 Ch. 729, 1900, 2 Ch. 736.

(*z*) Above, pp. 504—506.

(*a*) *Burroughs v. Oakley*, 3 Swanst. 159, 170.

from the commission or continuance of any such act of waste as will depreciate the vendor's security for payment. In this respect the purchaser's position resembles that of a mortgagor in possession (*b*). If the purchaser take possession before completion without the vendor's leave, he may be ejected and restrained by injunction from re-entry, or from the commission of waste, as a mere trespasser may (*c*). The question to what extent the purchaser's entry into possession before completion may be a waiver of objection to the title has already been considered (*d*).

If at the date of the contract for sale the purchaser be in possession of the property sold as tenant to the vendor from year to year or for any other term, and the contract is subject to the usual condition that the vendor shall show a good title, the tenancy is not determined at law pending completion of the contract (*e*); though in equity the purchaser, of course, has the rights incident to his position under the contract (*f*). And it appears that in such case, in the absence of stipulation to the contrary, the purchaser will be entitled to the rents and profits and liable to pay interest on the purchase money as from the date of the contract, notwithstanding that the contract be conditional on the vendor's showing a good title (*g*). If at the date of the contract the purchaser be in possession as tenant at will to the vendor, it appears that the tenancy is determined by the contract, and that thenceforth the purchaser is

Purchaser already in possession as vendor's tenant.

(*b*) *Crockford v. Alexander*, 15 Ves. 138; *Humphreys v. Harrison*, 1 J. & W. 581; *King v. Smith*, 2 Hare, 239, 244; *Goodman v. Kine*, 8 Beav. 379; Wms. Real Prop. 552, 21st ed.

(*c*) See *Crockford v. Alexander*, 15 Ves. 138.

(*d*) Above, pp. 188—190.

(*e*) *Doc d. Gray v. Stanion*, 1 M. & W. 695; *Tarte v. Darby*, 15 M. & W. 601.

(*f*) Above, p. 504; *Daniels v. Davison*, 16 Ves. 249, 253.

(*g*) *Townley v. Bedwell*, 14 Ves. 590, 597; *Daniels v. Davison*, 16 Ves. 249, 253; see *Mell v. Haywood*, 6 Ch. D. 196.

to be treated as being in possession under the contract (*h*).

Orders for purchaser in possession to pay price into Court or give up possession.

If an action be brought for the specific performance (*i*) of a contract for the sale of land and the purchaser be in possession, he may be ordered, pending the trial of the action, to pay the purchase money into Court, or at his election either to pay the money into Court or to give up possession. The Court makes such orders for the preservation of the property, which is the subject of the action, considering it unjust to allow the purchaser to have both the land and the purchase money in his possession pending the trial. Thus, if the purchaser exercise any act of ownership, such as felling timber or working mines, which impairs the vendor's security for payment of the price, he will be ordered to pay the purchase money into Court without having the option of giving up possession instead; and this is the case, whether the purchaser were put into possession pursuant to the contract or with the vendor's consent given after the contract (*k*). And where the vendor has shown such a title as the purchaser ought to accept, or the purchaser has accepted the vendor's title, the purchaser being in possession will be ordered to pay the purchase money into Court (*l*). Where the purchaser being in possession has done nothing to diminish the value of the property, he will not be ordered to pay the purchase money into Court without being offered the alternative

(*h*) *Daniels v. Davison*, 16 Ves. 249, 252, 253.

(*i*) The orders here mentioned will not be made at the instance of a vendor suing for rescission of the contract; but other proper orders for the preservation of the property in dispute may be made in such an action: *Cook v. Andrews*, 1897, 1 Ch. 266.

(*k*) *Dixon v. Astley*, 19 Ves.

564, 1 Mer. 133; *Cutler v. Simons*, 2 Mer. 103; *Bradshaw v. Bradshaw*, ib. 492; *Bramley v. Teal*, 3 Madd. 219; *Pope v. Great Eastern Rail. Co.*, L. R. 3 Eq. 171; *Lewis v. James*, 32 Ch. D. 326, 330.

(*l*) *Bradshaw v. Bradshaw*, 2 Mer. 492, 493; *Crutchley v. Jer-ningham*, ib. 502; *Wood v. Edwards*, 1876, W. N. 15.

of giving up possession (*m*) ; but it appears that, where he has been let into possession with the vendor's leave but not under the contract, he will, as a rule, be ordered to elect within a specified time whether he will pay the money into Court or give up possession, notwithstanding that a good title has not yet been shown (*n*), unless there be delay in making out the title attributable to the vendor's *laches* (*o*). Where the purchaser has been put into possession pursuant to the contract for sale, the Court will not, in general, so put him to his election (*p*). And where the purchaser's right to possession is referable to some other title than that conferred by the contract or the vendor's leave given after the contract, as where he entered under a lease granted to him prior to the sale, there appears to be no ground for requiring him to elect as above mentioned (*q*).

§ 2.—*Of the Transfer pending Completion of the Rights and Liabilities under the Contract.*

We will now consider the effect of the transfer of the rights and liabilities created by the contract pending the completion thereof. This may take place either involuntarily, which is mainly by act of law, or voluntarily, that is, by act of the parties. The former case occurs upon the death, bankruptcy or personal incapacity supervening since the contract of either party thereto, and on the land sold being taken in execution

Transfer pending completion of the rights and liabilities under the contract.

(*m*) *Greenwood v. Turner*, 1891, 2 Ch. 144.

(*n*) *Clarke v. Wilson*, 15 Ves. 317; *Gibson v. Clarke*, 1 V. & B. 500; *Smith v. Lloyd*, 1 Madd. 83; *Wickham v. Eversal*, 4 Madd. 53; *Young v. Duncombe*, Young, 275; *Tondal v. Cobham*, 2 My. & K. 385; *Fauler v. Ward*, 6 Jur. 547.

(*o*) *Fox v. Birch*, 1 Mer. 105.

(*p*) *Gibson v. Clarke*, 1 V. & B.

500, 501; *Morgan v. Shaw*, 2 Mer. 138; *Gell v. Watson*, 3 Madd. 225; *Pease v. Cambridge Rail. Co.*, L. R. 2 Ch. 444.

(*q*) *Bonner v. Johnston*, 1 Mer. 366; *Freebody v. Perry*, G. Coop. 91. Note that in *Greenwood v. Turner*, 1891, 2 Ch. 144, the lease under which the purchaser claimed to be in possession had expired at the time of the motion.

of a judgment against the vendor; the latter upon the assignment *inter vivos* by either party of his rights under the contract. We will consider each of these cases in turn, first, as regards the vendor, and, secondly, with respect to the purchaser, premising that the contract, once validly concluded, is not avoided by the death, bankruptcy, or supervening incapacity of either party thereto, and remains, as a rule, enforceable not only at law but specifically in equity at suit of either party thereto, his representatives in law or assigns, against the other party or his representatives in law (*r*). The contract is also specifically enforceable against the vendor's assigns *inter vivos* of the land other than those who have taken the legal estate therein as purchasers in good faith for valuable consideration actually paid or executed without notice of the contract (*s*).

Death of the vendor.

On the vendor's death, his rights under the contract pass to his executors or administrators, who are the proper persons to sue upon the contract either for damages at law or for specific performance in equity (*t*). But in order to reap the benefit of the contract, the personal representatives must, of course, procure the performance of the vendor's part of the agreement—that is, the conveyance to the purchaser of the land sold—and it is therefore necessary to consider upon what persons the vendor's estate in the land sold

Devolution of the vendor's estate.

(*r*) *Baden v. Pembroke*, 2 Vern. 213; *Owen v. Davies*, 1 Ves. sen. 82; *Hinton v. Hinton*, 2 Ves. sen. 631, 633; *Taylor v. Stibbert*, 2 Ves. jun. 437, 439; *Brooke v. Hewitt*, 3 Ves. jun. 253; Sug. V. & P. 175, 208; 1 Dart, V. & P. 255, 995, 996, 5th ed.; 291, 1114, 1115, 6th ed.; 296, 1029, 1030, 7th ed.; Fry, Sp. Perf. §§ 211, 212, 241, 274, 275, 3rd ed.; *Pearce v. Bastable's Trustee*, 1901, 2 Ch. 122.

(*s*) *Daniels v. Davison*, 16 Ves.

249, 17 Ves. 433; *Potter v. Sanders*, 6 Hare, 1; 2 Dart, V. & P. 823, 824, 996, 5th ed.; 927, 928, 1115, 6th ed.; 836, 837, 1030, 7th ed.

(*t*) *Baden v. Pembroke*, 2 Vern. 212; *Eaton v. Sanxter*, 6 Sim. 517; *Roberts v. Marchant*, 1 Ph. 370; *Hoddel v. Pugh*, 33 Beav. 489; Sug. V. & P. 177; 1 Dart, V. & P. 256, 1008, 5th ed.; 293, 1130, 6th ed.; 296, 1029, 7th ed.; Fry, Sp. Perf. § 212, 3rd ed.

devolves upon his death pending completion. This depends upon the nature of the property sold. If it were freehold in fee the vendor's estate therein formerly passed, on his death before completion, to his heir or devisee, according as he had left the same to descend or disposed thereof by his will; and the heir or devisee was obliged to convey the estate to the purchaser (*u*). The vendor's estate would not only go to a specific devisee thereof, but might also pass under a general devise of all his real estate, if the purposes of such a devise were not inconsistent with this construction (*x*). If, however, the vendor had devised all his real estate generally to one, and all estates held by him upon any trust to another, it was a question how far the estate sold was held by the vendor upon a trust so as to pass under the devise of his trust estates. Where the title had been accepted prior to the vendor's death, it was held that the property was vested in him upon a trust, and so passed under a devise of his trust estates; but it appears that if the vendor had died prior to the acceptance of the title, the property sold would not have been held by him upon an absolute trust, for the contract had not yet become unconditionally binding on him, and so the land would have passed to his general devisee (*y*). Under the Land Transfer Act, 1875 (*z*), freeholds or copyholds held in fee and sold might have passed, on the vendor's death and intestacy, to his legal personal representative, if he had been a *bare* trustee thereof; but this would only have been the case where the title had been accepted and the purchase money

Freeholds
in fee.

(*u*) The heir or devisee was a necessary party to a suit for specific performance of the contract, both on this account and as having an interest in disputing the contract: see previous note.

(*x*) See *Wall v. Bright*, 1 J. & W. 494; *Lysaght v. Edwards*, 2 Ch. D. 499, 510—513; 1 Jarm.

Wills, 693, 703—706, 4th ed.; 647, 654—657, 5th ed.

(*y*) *Lysaght v. Edwards*, 2 Ch. D. 499.

(*z*) Stat. 38 & 39 Vict. c. 87, s. 48, replacing 37 & 38 Vict. c. 78, s. 5 (above, p. 220), and repealed by 44 & 45 Vict. c. 41, s. 30.

paid (*a*). Under the Conveyancing Act of 1881 (*b*), freeholds held in fee and sold may pass, on the vendor's death before completion, to his legal personal representatives, notwithstanding any testamentary disposition thereof, if they were vested in the vendor upon a trust within the meaning of sect. 30 of that Act. This is the case if the title had been accepted and the purchase money paid before the vendor's death (*c*); and apparently it is so, if before his death the contract had become unconditionally binding on the parties by reason of the purchaser's acceptance of the title (*d*), but this point has not been precisely so decided. Under the same Act (*e*), however, where at the death of any person there is subsisting a contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract. Under this Act, therefore, the legal personal representatives of a vendor of freeholds in fee, or a freehold estate *pur autre vie* (*f*), who has died since the commencement of the Act, and pending completion, have been enabled to complete the contract by conveying the legal estate to the purchaser in all cases in which the vendor had in his lifetime entered into a valid contract for sale. But it is to be observed that the power of conveyance given by the 4th section of the Act depends on the existence

(*a*) *Morgan v. Swansea Urban, &c. Authority*, 9 Ch. D. 582; *Re Cunningham and Frayling*, 1891, 2 Ch. 567; see *Re Cuning*, L. R. 5 Ch. 72.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 221.

(*c*) *Re Cuning*, L. R. 5 Ch. 72.

(*d*) See *Lysaght v. Edwards*, 2 Ch. D. 499; *Re Pagani*, 1892, 1 Ch. 236.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 4, applying only in cases of death after the 31st December, 1881, and providing that a conveyance made thereunder shall not affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate.

(*f*) Above, p. 216.

at the vendor's death of a contract for sale *enforceable* against his heir or devisee. It seems, therefore, that the power does not arise where the contract for sale was oral only, or put into writing but not signed by the vendor (*g*), unless this objection to the enforcement of the contract should have been removed under the doctrine of part performance or otherwise (*h*). And where a conveyance has been made in pursuance of this enactment, it appears to be a necessary part of the title to prove that the power so exercised duly arose; and for this purpose production of a contract for sale, duly put into writing and signed, may, it seems, be required (*i*). As we have seen, under the Land Transfer Act, 1897 (*k*), a deceased person's freehold estate of inheritance now passes, notwithstanding any testamentary disposition thereof, to his personal representatives, as trustees for the persons by law beneficially entitled thereto. It appears, therefore, that if a vendor of freeholds in fee die since the commencement of that Act, and pending the completion of the contract, his estate therein must devolve upon his executors or administrators in any event. If the contract should have been so far performed that the vendor was, at the date of his death, an absolute trustee of the land for the purchaser, the vendor's estate appears to pass to his executors or administrators, under sect. 30 of the Conveyancing Act of 1881 (*l*); otherwise they appear to take the estate under the Land Transfer Act, 1897 (*m*).

(*g*) Above, p. 11.

(*h*) Above, pp. 11—14.

(*i*) See 1 Key & Elph. Prec. Conv. 511, n., 4th ed. : 534, 535 and notes, 8th ed.

(*j*) Stat. 60 & 61 Viet. c. 65, s. 1 (1); above, pp. 228, 229.

(*l*) Above, p. 530.

(*m*) It appears, however, that the vendor's heir or devisee should still be made a party to any action for specific performance of the contract, as having an interest in disputing the contract : above, pp. 528, n. (*l*), 529, n. (*u*) ; Rawlins, Sp. Perf. 83.

Estate tail.

If the vendor were seised of the property sold for an estate tail, it appears that his estate therein still passes, on his death pending completion and without having barred the entail, to the heir in tail (*n*), or if there be no such heir, to the reversioner or remainderman. And the contract is not enforceable against these persons (*o*), notwithstanding that the vendor in his lifetime could have made a good title by barring the entail (*p*), and might have been decreed to perform the contract specifically (*q*). But if the vendor, being a tenant in tail only, had entered into an absolute contract for sale of the fee simple, his death without having barred the entail causes a breach of the contract to show a good title, and for this his executors are liable in damages at law. If the tenant in tail should have contracted to sell the entailed lands in exercise of the power of sale given to him by the Settled Land Act, 1882 (*r*), and died pending completion, the contract would be enforceable against all persons entitled to the lands after his death under the settlement by virtue of which he held the same (*s*). Such a contract is quite different from a contract to exercise the power of disposition annexed by law to the ownership of his estate. In the one case

Sale by tenant
in tail under
the Settled
Land Acts.

(*n*) Above, p. 234.

(*o*) Stat. 3 & 4 Will. IV. c. 74, s. 40; Sug. V. & P. 427; 2 Dart. V. & P. 998, 5th ed.; 1117, 6th ed.; 1032, 7th ed. As to the old law, see *A.-G. v. Day*, 1 Ves. 218, 224; *Frank v. Mainwaring*, 2 Beav. 115, 126.

(*p*) *Cattell v. Corral*, 4 Y. & C. 228; see above, p. 385, n. (*p*). Here it may be noted that under stat. 3 & 4 Will. IV. c. 74, ss. 1, 15, a tenant in tail, who has by deed unenrolled conveyed away all his estate in the lands entailed, whether to a purchaser for value or to a volunteer, may nevertheless subsequently bar the entail, by a proper disentailing assurance duly executed and enrolled

under the Act. In such case, if the prior conveyance were made in favour of a purchaser for valuable consideration, the subsequent assurance will (unless it were itself made to a purchaser for value not having express notice of the prior conveyance) operate to confirm the prior conveyance; see sect. 38; *Sturgis v. Morse*, 2 De G. F. & J. 223; *Hankey v. Martin*, 49 L. T. 560; Cotton, L. J., *Bankes v. Small*, 36 Ch. D. 716, 721; *Re Gaskell & Walters' Contract*, 1906, 2 Ch. 1.

(*q*) Sug. V. & P. 205; *Bankes v. Small*, 36 Ch. D. 716.

(*r*) Stat. 45 & 46 Vict. c. 38, s. 58 (1) (i).

(*s*) Sect. 31 (2).

the purchase money is intended to be paid, not to the vendor, but to trustees or into Court in trust for the persons entitled under the settlement (*t*), and it is not intended to bar the entail: in the other, the vendor proposes to bar the entail and to take the purchase money for himself (*u*). It appears that an open contract to sell the fee made by a tenant in tail would be referable to the power of disposition annexed to his ownership of the estate (*x*), as the purchase money would be payable to himself. If the property sold were copyhold Copyholds. held for a customary estate in fee and the vendor had been admitted tenant, his estate will not pass, on his death pending completion, to his executors or administrators, either under sect. 30 of the Conveyancing Act of 1881 (*y*), or under the Land Transfer Act, 1897 (*z*), but will go to his customary heir or devisee, according as he died intestate or testate in respect thereof, pursuant to the old law formerly affecting freeholds (*a*). If the property sold were copyhold, in which the vendor had an equitable estate in fee or of which he was an unadmitted surrenderee in fee, it appears that, on his death before completion, his estate would pass to his executors or administrators if he were then a trustee thereof within the meaning of sect. 30 of the Conveyancing Act of 1881 (*b*); and if not, it would appear to pass to them under the Land Transfer Act, 1897 (*c*). The 4th section of the Conveyancing Act of 1881 (*d*) relates only to the case of the sale of the fee simple or other *freehold* interest descendible to the heirs *general*, and does not therefore apply in the case of the sale of an estate of inheritance, whether legal or equit-

(*t*) Above, p. 300.

(*u*) Wms. Real Prop. 91, 99, 108, 109, 21st ed.

(*x*) See Sug. Pow. 343 *sq.*, 8th ed.; Farwell on Powers, 266, 2nd ed.

(*y*) Above, p. 221.

(*z*) Above, pp. 228, 231–236.

(*a*) Above, pp. 216, 529.

(*b*) Above, pp. 221, 222, 530.

(*c*) *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583; above, p. 235.

(*d*) Above, p. 530.

Leaseholds. able, in any copyhold hereditaments. If the property sold were leaseholds for years, the vendor's estate therein would in any case pass, on his death before completion, to his executors or administrators at common law (*e*).

Conversion of the land sold in the vendor's hands. As between the vendor and his own representatives after his death, the property sold, if real estate, is, as we have seen (*f*), converted into personalty as from the date of the contract for sale, provided that the contract become fully binding by the acceptance of the title. If this condition be fulfilled, the purchase money and the vendor's lien therefor belong, in case of his death before completion, to his executors or administrators as part of his personal estate (*g*): but the benefit of the vendor's right to take the rents and profits up to the proper time for completion will pass, if he die before that time, to his heir or devisee (*h*), subject to the executor's or administrator's interest therein for payment of the vendor's debts under the Land Transfer Act, 1897 (*i*). If the vendor should, prior to the contract for sale, have specifically devised the land afterwards sold, the devise—although it would, prior to the Land Transfer Act, 1897, convey the vendor's estate at law (*k*)—is in equity adeemed; so that the devisee is not entitled to the purchase money (*l*) unless a contrary intention should appear from the will (*m*). If a contract for the sale of

(*e*) Above, pp. 217, 219.

(*f*) Above, p. 505.

(*g*) Above, pp. 506, 528.

(*h*) *Lumsden v. Fraser*, 12 Sim. 263; 1 Dart, V. & P. 263, 5th ed.; 302, 6th ed.; 306, 7th ed.; *Watts v. Watts*, L. R. 17 Eq. 217.

(*i*) Above, pp. 229—231.

(*k*) Above, p. 529.

(*l*) *Moor v. Raibach*, 12 Sim. 123; *Farrar v. Winterton*, 5 Beav. 1; *Weeding v. Weeding*, 1 J. & H. 424, 431; *Watts v. Watts*, L. R. 17 Eq. 217; Sug. V. & P. 190; 1 Dart, V. & P. 263, 5th

ed.; 302, 6th ed.; 306, 7th ed. The same law is applicable where the land has been disposed of by will in exercise of a general or special power of appointment and afterwards sold: *Re Dowsett*, 1901, 1 Ch. 398; *Beddington v. Baumann*, 1903, A. C. 13.

(*m*) *Drant v. Vause*, 1 Y. & C. C. C. 580; *Eruss v. Smith*, 2 De G. & S. 722; *Weeding v. Weeding*, 1 J. & H. 424, 431; 1 Dart, V. & P. 263, 264, 5th ed.; 302, 303, 6th ed.; 306, 7th ed.; and see Sugd. Law of Property, 223.

real estate become unconditionally binding by the acceptance of the vendor's title and the vendor die pending completion, and afterwards the contract fail to be performed owing to the purchaser's default in payment of the price, the land becomes in equity the property of the persons entitled on the vendor's death to his personal estate; for they became absolutely entitled to the benefit of the vendor's lien when the contract became fully binding; and they remain entitled, on failure of the contract by the purchaser's default, to take possession of their security *in specie* (n). But if the contract never become absolutely binding upon and specifically enforceable against both parties, as where there is a failure to show a good title on the vendor's part, or the contract is voidable *ab initio* and is avoided for fraud, misrepresentation, or any other cause (such as omission to comply with the Statute of Frauds (o)), there is no conversion of the property sold in the vendor's hands, and if he die, the land, which was the subject of the contract, will pass as such to the persons entitled to his lands either on his intestacy or under his will (p). And the like result follows where a contract for sale of lands has been rescinded or abandoned by consent of the parties in the vendor's lifetime (q). When a man has entered into a valid contract giving to another an option to purchase (r) his real estate, the

Option to
purchase.

(n) *Curie v. Boyer*, 5 Beav. 6, n.; *Lysaght v. Edwards*, 2 Ch. D. 499, 506.

(o) Above, p. 11.

(p) Above, pp. 21 *seq.*; and see *Haynes v. Haynes*, 1 Dr. & Sm. 426; *Edwards v. West*, 7 Ch. D. 858, 862; 1 Jarm. Wills. 54, 5th ed.

(q) Sug. V. & P. 191; and consider *Ridout v. Fowler*, 1904, 1 Ch. 658, 2 Ch. 93.

(r) A contract giving an option to purchase any land gives an interest in the land to the person

who has the option, and must therefore conform with the 4th section of the Statute of Frauds (above, p. 3); see *London and South Western Railway v. Gomm*, 20 Ch. D. 562; above, pp. 370, 371. In order that an option to purchase any land may be well exercised, the terms of the contract, grant or devise, which created the option, must in all respects be strictly pursued, and where any particular time is specified for the exercise of the option, time is of the essence of

property is converted into personalty in the hands of the vendor, his heirs and assigns, as from the time of the exercise of the option; and if the vendor die before that time, his heirs or assigns of the hereditaments in question are entitled to the rents and profits thereof until the option is exercised, after which, in the absence of any disposition to the contrary made by his will (*s*), his legal personal representatives are entitled to the purchase money, with interest from that time until payment, as part of his personal estate (*t*).

Conveyance
of deceased
vendor's
estate by vest-
ing order.

As we have seen (*u*), in case of the vendor's death pending completion, a conveyance of his estate must be executed to the purchaser before the purchase money can be obtained. Such a conveyance cannot always be immediately executed by the persons on whom the vendor's estate has devolved on account of their being under disability or from other causes. In certain cases of this kind the required conveyance may be effected by vesting order made under the jurisdiction conferred by the Lunacy Act, 1890 (*x*), or the Trustee Act, 1893 (*y*).

the contract or matter: *Brooke v. Garrod*, 2 De G. & J. 62; *Ranelagh v. Melton*, 10 Jur. N. S. 1141; *Weston v. Collins*, 11 Jur. N. S. 190; and see *Mills v. Haywood*, 6 Ch. D. 196; *Bruner v. Moore*, 1904, 1 Ch. 305. The benefit of an option given by covenant contained in a lease to the lessee, his executors, administrators or assigns, to purchase the fee simple of the demised premises goes, after the lessee's death, to the persons becoming entitled to the lease: *Re Adams and Kensington Vestry*, 27 Ch. D. 394. As to the question how far an option to purchase must conform with the rule against perpetuities, see

above, pp. 370—372. As to the effect of a contract to give the first refusal of land, see *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, 1901, 2 Ch. 37.

(*s*) See above, p. 534, n. (*m*).

(*t*) *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 590; *Weeding v. Weeding*, 1 J. & H. 424; *Re Adams and Kensington Vestry*, 27 Ch. D. 394, 399.

(*u*) Above, p. 529.

(*x*) Stat. 53 Vict. c. 5, s. 135, enabling the Judge in lunacy to make a vesting order when a lunatic is solely or jointly seised or possessed of, or entitled to a contingent right in any land upon trust.

(*y*) Stat. 56 & 57 Vict. c. 53, ss. 26—34. These enactments and that mentioned in the previous note have replaced the Trustee Acts, 1850 and 1852 (stats. 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55), which

But, except where the contract is established by bringing an action for its specific performance, the Court will

replaced 11 Geo. IV. & 1 Will. IV. c. 60 : 4 & 5 Will. IV. c. 23 : and 1 & 2 Vict. c. 69.

By the Trustee Act, 1893, s. 26, the High Court may make a vesting order—

- (i.) Where the High Court appoints or has appointed a new trustee ;
- (ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person—
 - (a) is an infant, or
 - (b) is out of the jurisdiction of the High Court, or
 - (c) cannot be found ;
- (iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land ;
- (iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead ;
- (v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of any land and is dead ;
- (vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement.

By sect. 27, where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

By sect. 31, where judgment is given (amongst other things) for the specific performance of a contract concerning any land, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

By sect. 32, vesting orders have the effect of a conveyance by the proper persons. By sect. 33, the Court may, in all cases where a vesting order can be made, appoint a person to convey, and a conveyance by such person shall have the same effect as a vesting order. By sect. 34, where an order vesting copyhold land is made with the

not make a vesting order as to a deceased vendor's estate under these Acts unless the contract had been so far executed in his lifetime that at the time of his death he was unquestionably an absolute trustee for the purchaser (*z*); as, for example, where the whole or the bulk of the purchase money had been paid and the purchaser let into possession (*a*). It may be observed that the construction so placed on these Acts is not inconsistent with the doctrine that the vendor is a trustee for the purchaser conditionally as from the date of the contract, and absolutely when the contract has become fully binding by the acceptance of the title (*b*). The Court, in exercising the jurisdiction conferred by these Acts, does not question this doctrine; it merely requires indisputable evidence of the vendor's absolute trusteeship before it will treat his representatives as trustees.

Death of
vendor who
sold under a
power.

Where the owner of a power of appointment over land has contracted to sell the land in exercise of the power (*c*), and dies before completion of the sale by conveyance under the power, the contract for sale is treated in equity on the same footing as a defective execution of the power, and will accordingly be specifically enforceable by the purchaser against the persons

consent of the lord of the manor, the land shall vest without surrender or admittance; and where a person is appointed to convey any copyhold land, he shall do all things necessary to complete the assurance thereof, and the lord of the manor shall, subject to the customs of the manor and the usual payments, admit him accordingly.

(*z*) *Re Carpenter*, Kay, 418;
Re Colling, 32 Ch. D. 333.

(*a*) *Re Cumming*, L. R. 5 Ch. 72;
Re Pagani, 1892, 1 Ch. 236.

(*b*) Above, pp. 505, 529, 530.

(*c*) The question whether the vendor contracted to sell in exercise of the power depends upon his intention. It is not necessary that the contract should refer to the power. Where the vendor had no estate in the land, it will

be presumed that he contracted to sell in exercise of his power; but where he had an estate in the land as well as the power, it is a question of construction whether he contracted to sell in exercise of the right of alienation annexed to his estate or of the power: see *Blake v. Marnell*, 2 Ball & Beat. 35; Sug. Pow. 201 *sq.*, 289, 343 *sq.*, 8th ed.; Farwell on Powers, 266, 2nd ed.; above, pp. 532, 533.

entitled to the lands in default of appointment. Thus, if the power of appointment were exercisable by deed only, and the contract for sale were made by unsealed writing, and the vendor died before conveyance, equity would supply the defect in favour of the purchaser, and would oblige the persons entitled in default of appointment to carry out the contract (*d*). But in order that a contract to exercise a power over land may be so binding on those entitled in default of appointment, it must be valid from the beginning; and it appears that a parol contract, followed by part performance by the purchaser, is not so enforceable against them (*e*), unless, with knowledge of the parol contract, they lie by and allow him to lay out money on the estate (*f*). Every contract for the sale of settled land made by a tenant for life or any person having the powers of a tenant for life under the Settled Land Act, 1882 (*g*), is binding on, and enures for the benefit of, the settled land, and is enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor, but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself. And by the Settled Land Act, 1890 (*h*), a tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which, if made by such predecessor, would have been valid as against his successors in title. This enactment appears to be applicable, not only where the contract was made in exercise of some power conferred by the

Contracts for the sale of settled land under the Settled Land Acts.

(See.)

(*d*) *Coventry v. Coventry*, 1 Str. 596; *Mortlock v. Buller*, 10 Ves. 292, 315; *Shannon v. Broadstreet*, 1 Sch. & Lef. 52; Sug. Pow. 552, 563, 8th ed.; *Re Dykes*, L. R. 7 Eq. 337, 342.

(*e*) *Blore v. Sutton*, 3 Mer. 237; *Morgan v. Milman*, 3 De G. M. &

G. 21, 33.

(*f*) *Stiles v. Cowper*, 3 Atk. 692; *Shannon v. Broadstreet*, 1 Sch. & Lef. 52, 72, 73.

(*g*) Stat. 45 & 46 Vict. c. 38, ss. 31 (1), 2, 58.

(*h*) Stat. 53 & 54 Vict. c. 69, s. 6.

Settled Land Acts, but in all other cases where the contract binds the contractor's successors in estate; for example, where one seised of lands in fee has sold them, and died pending completion, having devised the lands to another for life with remainder over. But in these circumstances, if the vendor died after the commencement of the Land Transfer Act, 1897 (*i*), the purchaser could not safely take a conveyance from the tenant for life under the will, except where the real estate sold was not affected by this Act, as in the case of copyholds (*k*), for the effect of the Act is to prevent any legal estate from passing to the devisees, and in equity the devise, if made prior to the sale, would be revoked thereby (*l*).

Devolution of the burthen of the contract on the vendor's death.

If the vendor die pending completion, the proper persons to be sued by the purchaser for the specific performance of the contract are the vendor's executors or administrators, as being his general representatives in respect of his contractual liabilities and being the persons entitled to receive the purchase money; but the vendor's heir or devisee, who would have been entitled to the land if it had not been sold, was formerly and, it appears, is still a necessary party to the action, as having an interest in disputing the validity of the contract (*m*). The vendor's legal personal representatives are the proper persons to be sued for breach of the contract at law (*n*).

Death of the purchaser.

We have seen (*o*) that when a man enters into a contract, which is valid and specifically enforceable, for the

(*i*) Above, pp. 228 *sq.*, 531.

(*k*) Above, pp. 229, 235, 533.

(*l*) Above, pp. 228 *sq.*, 534.

(*m*) Above, pp. 528, n. (*l*), 529, n. (*n*), 531, n. (*m*), and the authorities there cited; Rawlins on Specific Performance, 83.

(*n*) But if the contract were under seal and bound the vendor's heirs, his heirs or devisees might be sued thereon at law: see above, p. 223; Wms. Conv. Stat. 234, 235.

(*o*) Above, pp. 505, 506.

purchase of land, the land is in equity *his* land as from the date of the contract. If therefore he die pending the completion of the contract, the benefit of his rights under the contract passes to the persons who become entitled to that particular part of his lands, which is represented by the property purchased. If this were freehold estate of inheritance, the beneficial interest therein passed formerly to his heir, if he died intestate in respect thereof, and otherwise to his specific or general devisee (*p*); and in the hands of such heir or devisee would be *real* assets for payment of his debts (*q*). Under the Land Transfer Act, 1897 (*r*), freehold estate of inheritance contracted to be purchased appears to pass, on the purchaser's death pending completion, to his executors or administrators, upon trust, subject to the payment of his funeral and testamentary expenses and debts, for his heir or devisee. If the property purchased were a legal estate of inheritance in copyholds, the purchaser's interest devolves upon his customary heir or devisee; and it does not appear that his executors or administrators take any estate therein under the Land Transfer Act, 1897: but the personal representatives take the purchaser's estate where he bought an equitable estate only in copyholds (*s*). In either case the lands would be real assets for payment of the purchaser's debts (*t*). If leaseholds were purchased, they pass of course to the purchaser's executors or administrators as part of his personal estate. The persons so becoming entitled, on the purchaser's death, to the land which he has contracted to purchase, are the proper persons to sue for

(*p*) Since the Wills Act, 1837, lands purchased after the date of a will pass under a general devise therein contained: previously they did not: Sug. V. & P. 183—189; stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 23, 24.

(*q*) Above, pp. 222, 223, 506.

(*r*) Stat. 60 & 61 Vict. c. 65, ss. 1, 2; above, pp. 228, 229.

(*s*) *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583; above, pp. 229, 233—235.

(*t*) Above, pp. 222, 223.

the specific performance of the contract by the vendor: but the purchaser's legal personal representatives should be made parties to such an action, if brought by his heir or devisee, as they are liable to the vendor for payment of the purchase money and have an interest in disputing the contract (*u*). The proper persons to sue, after the purchaser's death, for damages at law for breach of the contract are his legal personal representatives (*x*); and any damages so recovered appear to form part of the purchaser's personal estate.

Purchaser's
heir or devisee
now takes
subject to the
vendor's lien.

Formerly, if one contracted to buy land and died pending completion, his heir or devisee, in the case of real estate, or his specific devisee in the case of leaseholds, was entitled to have the purchase money paid out of the deceased purchaser's general personal estate (*y*). But now, under the Acts amending Locke King's Act (*z*), the heir or devisee, or the specific devisee of leaseholds (*a*), or other chattels real (*b*), must take the here-

(*u*) Fry, *Sp. Perf.* § 217, 3rd ed. And it appears that where the purchaser's personal representatives sue for specific performance of a contract to buy real estate, as being entitled thereto under the Land Transfer Act, 1897, they should still make his heir or devisee a party as being the person beneficially entitled and being interested in securing a proper inquiry into the title: *Rawlins, Spec. Perf.* 83.

(*x*) *Orme v. Broughton*, 10 Bing. 533; *Sug. V. & P.* 238: 2 *Dart, V. & P.* 954, 5th ed.; 1084, 6th ed.; 998, 7th ed.

(*y*) *Broune v. Monck*, 10 Ves. 597, 614, 620, 621; *Hood v. Hood*, 3 *Jur. N. S.* 684.

(*z*) Stat. 40 & 41 *Vict. c.* 34, extending the provisions of 17 & 18 *Vict. c.* 113, and 30 & 31 *Vict. c.* 69, to the case of any testator or intestate dying after the 31st December, 1877, seised or pos-

sessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with any lien for unpaid purchase money, unless in the case of a testator he shall within the meaning of these Acts have signified a contrary intention; and providing that such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate. By stat. 30 & 31 *Vict. c.* 69, s. 1, a general direction that the debts of the testator shall be paid out of his personal estate is not to be deemed a declaration of such contrary intention without words expressly or impliedly referring to the debt charged on the land.

(*a*) *Re Kershaw*, 37 *Ch. D.* 674.

(*b*) *Re Fraser*, 1904, 1 *Ch.* 111, 726.

ditaments so purchased charged with the vendor's lien for payment of the purchase money, which is, as between the heir or devisee and the persons entitled to the purchaser's personalty, to be satisfied out of the estate purchased; unless the purchaser, being a *testator* of the property bought (*c*), should have signified a contrary intention within the meaning of the Acts. But these Acts do not affect the vendor's right to obtain payment of the purchase money out of all the purchaser's assets, real or personal (*d*). It is to be observed that the Acts apparently do not apply where the lands purchased are not subject to any vendor's lien, as may be the case if the parties so agree (*e*).

The right of a deceased purchaser's heir or devisee to succeed to real estate, contracted to be purchased by but not conveyed to him in his lifetime, depends upon the like condition as determines the question of the conversion of the property into personalty in the vendor's hands; that is to say, whether the contract was specifically enforceable against the purchaser at the time of his death. If this were so, the heir or devisee is absolutely entitled to the property; and he was formerly so absolutely entitled to have the purchase money raised out of the dead man's personalty that if the contract had been specifically enforceable against the purchaser at his death, but was not performed owing to some cause subsequently occurring, the heir or devisee was entitled to have the purchase money raised and applied in the purchase for him of other lands (*f*). But this was not the case where the contract failed to be per-

Test of the property devolving as land on the purchaser's death.

(*c*) See *Re Cockcroft*, 24 Ch. D. 94, 100.

(*d*) See stat. 17 & 18 Vict. c. 113.

(*e*) See *Re Cockcroft*, *ubi sup.*

(*f*) *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Braune v. Mounk*, 10 Ves. 597, 599, 606—608, 611;

Garnett v. Arton, 28 Beav. 333; *Hudson v. Cook*, L. R. 13 Eq. 417; *sed qu.* whether this last case was rightly decided; the purchaser had entered into a contract which was not absolute, but voidable by the vendor in certain events.

formed owing to the vendor's want of title; for that proved that the contract was not specifically enforceable against the purchaser when he died (*g*). This doctrine of allowing the heir or devisee to have the purchase money raised and laid out in buying other lands appears to be only applicable, under the present law, where the heir or devisee does not take the estate purchased subject to the vendor's lien (*h*).

Devolution of the burthen of the contract on the purchaser's death.

The burthen of the contract on the purchaser's death before completion devolves upon his legal personal representatives, who are the proper persons to be sued by the vendor either in equity for specific performance of the contract or at law for damages for its breach (*i*); but the purchaser's heir or devisee becoming entitled to the purchased land was, and apparently still remains, a necessary party to proceedings at suit of the vendor for specific performance of the contract, as having an interest in seeing that the inquiry into title is properly conducted (*k*).

Bankruptcy of either party to the contract.

A contract for the sale of land is not discharged either by an act of bankruptcy committed or by a receiving order or an adjudication of bankruptcy made pending completion by or against either party thereto (*l*); but after a receiving order has been made against either party, the other has no remedy against the property or person of the debtor in respect of any liability of the

(*g*) *Broome v. Monck*, 10 Ves. 597; *Collier v. Jenkins*, Younge, 295.

(*h*) Above, p. 542; *Re Cockcroft*, 24 Ch. D. 94, 100, 101.

(*i*) But if the contract were under seal, and bound the purchaser's heirs, his heirs or devisees might be sued thereon at law: 2 Dart, V. & P. 957, 5th ed.; 1084, 6th ed.; 998, 7th ed.;

see above, p. 223; Wms. Conv. Stat. 234, 235.

(*k*) *Townsend v. Champervorne*, 9 Price, 130; above, pp. 528, n. (*t*), 529, n. (*u*), 531, n. (*m*), 540; Rawlins on Specific Performance, 83, 84.

(*l*) *Brooke v. Hewitt*, 3 Ves. 253, 255; Sug. V. & P. 175; 1 Dart, V. & P. 253, 5th ed.; 291, 6th ed.; 294, 7th ed.

debtor which is provable in bankruptcy, and cannot commence any action or other legal proceedings to enforce such liability, unless with the leave of the Court, and on such terms as the Court may impose (*m*). And after the presentation of a bankruptcy petition against either party to the contract the Court may stay any action, execution, or other legal process then pending against him (*n*). When a receiving order has been made against either party to the contract, the other may prove under the bankruptcy proceedings in respect of the debtor's liability on any contract made by him, so far as such liability consists in the obligation to pay money or money's worth on breach of the agreement, or is capable of resulting in the payment of money or money's worth (*o*). And an order of discharge under the Bankruptcy Act, 1883 (*p*), or a composition or scheme of arrangement accepted and approved by the Court under the Bankruptcy Act, 1890 (*q*), will release the bankrupt or debtor from all liabilities provable in bankruptcy, with certain exceptions not material to be here stated. The vendor's liability on the contract at law seems to be provable in his bankruptcy, for it is reducible to the obligation to pay money damages on breach of the contract (*r*): but his liability in equity to perform the contract specifically depends on different considerations, and does not appear to be so provable (*s*). The purchaser's liability on the contract, whether at law or in equity, seems almost entirely to consist in his

(*m*) Stat. 46 & 47 Vict. c. 52, ss. 9, 168; see *Re Guedalla*, 1905, 2 Ch. 331.

(*n*) Sect. 10.

(*o*) Sect. 37; see *Hardy v. Fothergill*, 13 App. Cas. 351.

(*p*) Stat. 46 & 47 Vict. c. 52, s. 30.

(*q*) Stat. 53 & 54 Vict. c. 71, s. 3 (12); *Finch v. Bernard*, 22 Q. B. D. 90; *Seaton v. Deerpur*, 1895, 1 Q. B. 853; *Levy v. Stog-*

don, 1898, 1 Ch. 478, 483, 484, affirmed, 1899, 1 Ch. 5.

(*r*) Above, p. 36; *Levy v. Stogdon*, 1898, 1 Ch. 478, 483, 484, affirmed, 1899, 1 Ch. 5.

(*s*) See the cases cited in notes *z*, p. 546, *d*, p. 547, below; *Levy v. Stogdon*, ubi sup.; *Re Reis*, 1904, 2 K. B. 769, 777, 781, 787, affirmed, nom. *Clough v. Samuel*, 1905, A. C. 442; above, p. 37.

obligation to pay the price (*t*), and to be provable in his bankruptcy accordingly.

Bankruptcy
of the vendor.

If the vendor be adjudged bankrupt pending completion, his rights under the contract vest, as part of his property, in the trustee in his bankruptcy (*u*); and his estate in the land sold also vests in the trustee, unless, it appears, the contract had been executed by payment of the whole of the purchase money before the act of bankruptcy, so that the vendor had become a bare trustee for the purchaser (*x*). It has, however, been held, where leaseholds had been sold and the price paid but no conveyance executed, that the vendor was possessed of the legal estate in the term not only as trustee for the purchaser, but also for his own use in virtue of his lien on the property by way of indemnity against the rent and covenants of the lease, and that for this reason his estate passed on his subsequent bankruptcy to the trustee therein (*y*). But the trustee in the bankruptcy takes the vendor's estate in the land sold subject to the purchaser's equities therein under the contract (*z*); and if he cannot, or does not, disclaim the land sold under his power to disclaim onerous property (*a*), he cannot disclaim the contract for sale, where

(*t*) Above, pp. 34, 35; and see *Re Taylor*, 1910, 1 K. B. 562.

(*u*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 50 (*5*), 168; *Expte. Rabbidge*, 8 Ch. D. 367.

(*x*) See *S. C.*, 8 Ch. D. 371; *Re Taylor*, 1910, 1 K. B. 562; above, p. 529. It does not appear that the vendor could be treated as holding the land sold on trust for the purchaser, so that it would not pass to his trustee in bankruptcy, merely by reason of the acceptance of the title: see cases cited in note (*d*), below, p. 547.

(*y*) *St. Thomas's Hospital Governors v. Richardson*, 1910, 1 K. B. 271.

(*z*) *Expte. Holthausen*, L. R. 9 Ch. 722, 726; *Expte. Rabbidge*, 8 Ch. D. 367, 370, 371; *Re Taylor*, 1910, 1 K. B. 562; see above, pp. 504 *sq.*, 528.

(*a*) Stat. 46 & 47 Vict. c. 52, s. 55, amended by 53 & 54 Vict. c. 71, s. 13, empowering the trustee in bankruptcy within twelve months after the first appointment of a trustee, or where the property shall not have come to the knowledge of the trustee within one month after such appointment, within twelve months after he first became aware thereof, or in either case within such extended

it contains no more than the usual reciprocal duties of vendor and purchaser (*b*), as an unprofitable contract (*c*); but the specific performance of the agreement may be enforced against him by the purchaser (*d*). If the vendor should have bound himself by the contract to lay out money on the property sold prior to completion, his trustee in bankruptcy might, it is thought, be at liberty to disclaim the contract if it would be unprofitable, and so free himself from the obligation of incurring the expense: but even this disclaimer would not affect the purchaser's equitable interest in the land (*e*). And if the trustee in bankruptcy were entitled to disclaim, and should disclaim, the property sold as being onerous, as he might in the case of leaseholds, the purchaser's equitable interest therein would be equally unaffected (*e*), and the purchaser might apply to the Court for an order vesting the estate in him (*f*).

In consequence of the doctrine of the relation back of the title of a trustee in bankruptcy to the act of bankruptcy (*g*), if a purchaser of land have notice of an act of bankruptcy committed by the vendor, he cannot safely proceed with the contract (unless with the concurrence of the vendor's trustee in bankruptcy) during

Act of bankruptcy by the vendor.

period as may be allowed by the Court, to disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money; see *Re Cohen*, 1905, 2 K. B. 704.

(*b*) Above, pp. 32—35.

(*c*) See note (*a*), p. 546.

d *Perce v. Bastable's Trustee*, 1901, 2 Ch. 122; *Re Bastable*, 1901, 2 K. B. 518; *Re Taylor*, 1910, 1 K. B. 562.

(*e*) *Re Bastable*, 1901, 2 K. B. 518, 523; stat. 45 & 47 Vict. c. 52, s. 55 (2).

(*f*) Stat. 46 & 47 Vict. c. 52, s. 55 (6).

(*g*) Stat. 46 & 47 Vict. c. 52, ss. 4, 43, amended by 53 & 54 Vict. c. 71, ss. 1, 20; see *Ponsford v. Union of London & Bank*, 1906, 2 Ch. 444; above, p. 394, n. (*a*).

the three months for which the act of bankruptcy remains available as a ground of bankruptcy proceedings (*g*). For if the purchaser were to accept a conveyance from the vendor and to pay him the purchase money, then, if the vendor should afterwards be adjudged bankrupt in respect of that act of bankruptcy, the conveyance to the purchaser would be rendered ineffectual and the purchaser would be liable to pay the money over again to the trustee in bankruptcy (*h*). For these reasons, a vendor who has committed an act of bankruptcy is not entitled to enforce the specific performance of the contract (*i*). And where time is of the essence of the contract, as upon the sale of a public-house as a going concern (*k*), if the purchaser have notice of an act of bankruptcy by the vendor, which will be available at the time fixed for completion, he is entitled at law to treat the contract as broken, and to recover his deposit accordingly (*l*). Where time is not of the essence of the contract, as is usually the case on sales of land (*m*), it seems open to the purchaser, on receiving notice of an act of bankruptcy by the vendor, at once to object to the title, on the ground that after the act of bankruptcy the vendor can only convey an estate, which is no longer absolute but defeasible on adjudication, and cannot give a good receipt for the purchase money (*n*). And it is submitted that if the purchaser make this objection and at the time fixed for completion the vendor still remain unable to make a valid conveyance, either alone or with the concurrence of the trustee under an adjudication of bankruptcy

(*g*) See stat. 46 & 47 Vict. c. 52, ss. 6 (1) (c), 43.

(*h*) *Expte. Rabidge*, 8 Ch. D. 367; *Powell v. Marshall*, 1899, 1 Q. B. 710, 712, 713; *Davis v. Petric*, 1906, 2 K. B. 786; and see *Re Taylor*, 1910, 1 K. B. 562.

(*i*) *Loves v. Lush*, 14 Ves. 547.

(*k*) Above, p. 488.

(*l*) *Powell v. Marshall*, 1899, 1 Q. B. 710.

(*m*) Above, pp. 58, 59.

(*n*) See above, pp. 168, 169; *Loves v. Lush*, 14 Ves. 547, 549; *Goodwin v. Lightbody*, Dan. 153; *Hipwell v. Knight*, 1 Y. & C. 401, 419; Sug. V. & P. 176.

against him, the purchaser, not being in default with regard to the performance of his part of the contract, will be entitled to treat the contract as broken. But if at the time fixed for completion the act of bankruptcy have ceased to be available or the vendor have been adjudged bankrupt, it appears that the vendor or his trustee in bankruptcy, as the case may be, will be entitled to enforce the contract either specifically in equity or at law. And if the purchaser do not repudiate the contract in the manner indicated above, it appears that the vendor or his trustee in bankruptcy will be entitled to enforce the same, specifically or otherwise, after the act of bankruptcy has ceased to be available or an adjudication has taken place, although the day fixed for completion is gone by (*o*). The vendor's trustee in bankruptcy must, however, obtain the permission of the committee of inspection before bringing any action upon the contract against the purchaser (*p*). If the purchaser of his own accord choose to wait after the time fixed for completion, either until the vendor is adjudged bankrupt or until the particular act of bankruptcy has ceased to be available (*q*), he will be able to complete the contract safely, paying the purchase money to and taking a conveyance from the trustee in the bankruptcy in the former case, and in the latter the vendor himself. Under the Bankruptcy Act, 1883, if the purchaser should have no notice of an act of bankruptcy committed by the vendor, the conveyance of the property by and the payment of the purchase money to the vendor will not be invalidated in the event of the vendor being afterwards adjudged bankrupt upon that act of bankruptcy, provided that the conveyance and payment take

(*o*) See *Lowes v. Lush*, 14 Ves. 547, 549; Dart, V. & P. 498, 995, 5th ed.; 568, 1114, 6th ed.; 1225, 7th ed.; Rawlins on Specific Performance, 87; above, pp. 58,

59, 168, 169.

(*p*) Stat. 46 & 47 Vict. c. 52, s. 57 (2).

(*q*) Dart, V. & P. 498, 5th ed.; 568, 6th ed.; 1225, 7th ed.

place before the date of any receiving order made against the vendor (*v*). But if in such a case the completion of the contract should not take place until after that date, the purchaser is not protected; and it appears that both the conveyance to him and the payment by him would be rendered ineffectual on a consequent adjudication of bankruptcy against the vendor (*s*).

Insolvent vendor when discharged from liability on the contract.

If before completion of the contract the vendor be adjudged bankrupt and obtain an order of discharge, or a composition or scheme of arrangement with his creditors be accepted and approved by the Court, it appears that he will be released from his liability on the contract at law (*t*). But, as we have seen (*u*), the vendor's trustee in bankruptcy takes his legal estate in the land sold subject to the purchaser's equities therein; and if this estate were reconveyed to the vendor on his obtaining his discharge, he would take it subject to the same equities. Besides this, the vendor's correlative equitable liability to specific performance of the contract does not appear to be provable in bankruptcy (*x*); so that a vendor making a composition or scheme of arrangement with his creditors under the Bankruptcy Act, 1890, without parting with his estate in the land sold, does not appear to be discharged from his liability to perform the contract specifically at the purchaser's suit (*y*).

Vendor an undischarged bankrupt at the time of the contract.

Where the vendor is an undischarged bankrupt at the time when the contract of sale was made, he cannot give a

(*v*) Stat. 46 & 47 Vict. c. 52, s. 49.

(*s*) *Expte. Rabbidge*, 8 Ch. D. 367, decided on the Bankruptcy Act, 1869; and see *Powell v. Marshall*, 1899, 1 Q. B. 710, 713, 714; *Re Taylor*, 1910, 1 K. B. 562.

(*t*) Above, p. 545.

(*u*) Above, p. 546.

(*x*) Above, p. 545.

(*y*) See *Levy v. Stogdon*, 1898, 1 Ch. 478, 1899, 1 Ch. 5, where, however, the purchaser was barred by his delay from enforcing the specific performance of the contract, but was held to be entitled to a lien for the amount of his deposit.

good title to or convey the land sold, if it were vested in him before his bankruptcy (*z*), or being freehold or other real estate (whether legal or equitable) had been acquired by or devolved upon him since the commencement of the bankruptcy (*a*). If, however, the property sold be held for a term of years, and were acquired by or devolved upon the vendor since the commencement of the bankruptcy, he can make a valid disposition thereof to anyone dealing with him in good faith and for value, either with or without notice of the bankruptcy, before the trustee intervenes, and will therefore be entitled to enforce the contract against the purchaser in proceedings either for specific performance or damages (*b*). And this doctrine has been extended to real estate purchased by undischarged bankrupts for partnership purposes and so converted into their personal property (*c*). If a bankrupt's assets be more than sufficient to satisfy his liabilities, he can make a valid disposition of his equitable interest in the surplus assets or any particular portion thereof, subject to the rights of the trustee and of his creditors (*d*). Where a tenant for life has a power to consent to the exercise by trustees of a power given to them to sell the settled land and becomes bankrupt, the concurrence of the trustee in the bankruptcy is necessary to enable his power of consent to be effectually exercised (*e*). The effect of the bankruptcy of a tenant for life on his capacity to exercise the power of sale given to him by the Settled Land Acts has been already discussed (*f*).

Bankruptcy of tenant for life empowered to consent to a sale.

(*z*) Above, p. 546, *nn. (u), (x)*.

(*a*) Stat. 46 & 47 Vict. c. 52, s. 44; *Re New Land, &c. Assn. and Gray*, 1892, 2 Ch. 138; *Bird v. Philpott*, 1900, 1 Ch. 822; *Official Receiver v. Cooke*, 1906, 2 Ch. 661.

(*b*) *Re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.

(*c*) *Re Kent, &c. Coke Co., Ltd.*,

1909, 2 Ch. 195; see above, pp. 465, 466.

(*d*) *Bird v. Philpott*, 1900, 1 Ch. 822.

(*e*) *Re Beddingfield and Herring's Contract*, 1893, 2 Ch. 332; see Williams on Settlements, 43—45, 322, 323.

(*f*) Above, pp. 325—327.

Bankruptcy of
the purchaser.

If the purchaser be adjudged bankrupt pending completion, his rights under the contract vest in his trustee in bankruptcy (*g*), who will be entitled to enforce the same against the vendor by action brought with the permission of the committee of inspection (*h*) either for damages at law or for specific performance in equity (*i*). The trustee in bankruptcy of the purchaser is, however, at liberty to disclaim the contract as unprofitable (*k*), and so long as it remains open to him to exercise his option of disclaiming the contract (*l*), the vendor cannot, without his consent, maintain an action against him for specific performance of the contract (*m*). If the purchaser's trustee in bankruptcy disclaim the contract, this will operate to determine the liabilities of the bankrupt in respect thereof (*n*); the vendor will be entitled to retain the deposit, if any (*o*), and he may prove for any injury sustained by him in consequence of the disclaimer as a debt under the bankruptcy (*p*).

Act of bank-
ruptcy by the
purchaser.

If the vendor have notice of an act of bankruptcy committed by the purchaser, he cannot safely proceed with the contract so long as the act of bankruptcy remains available; for any money subsequently paid to him by the purchaser might be recovered back by the trustee under a consequent adjudication of bankruptcy against the purchaser (*q*). For this reason, a purchaser

(*g*) Above, p. 546, n. (*u*).

(*h*) Above, p. 549, n. (*p*).

(*i*) 2 Dart, V. & P. 995, 1004, 5th ed.; 1114, 1126, 6th ed.; 1029, 7th ed.; Rawlins on Specific Performance, 87, 88.

(*k*) Above, p. 546, n. (*a*); *Expte. Barrell*, L. R. 10 Ch. 512.

(*l*) See stat. 46 & 47 Vict. c. 52, s. 55; above, p. 546, n. (*a*).

(*m*) *Holloway v. York*, 25 W. R. 627.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 55 (2).

(*o*) *Expte. Barrell*, L. R. 10 Ch. 512; *Collins v. Stimson*, 11 Q. B. D. 142.

(*p*) Stat. 46 & 47 Vict. c. 52, s. 55 (7).

(*q*) Above, pp. 546, n. (*u*), 547, n. (*g*); see next note, and *Re Pollitt*, 1893, 1 Q. B. 175, 455; *Ponsford v. Union of London, &c. Bank*, 1906, 2 Ch. 444; *Davis v. Petrie*, 1906, 2 K. B. 786.

who has committed an act of bankruptcy remaining available against him cannot enforce the specific performance of the contract by the vendor (*r*). And it appears that if time be of the essence of the contract, and on the day fixed for completion the purchaser's act of bankruptcy still remain available against him, the vendor will be entitled to treat the contract as broken and to claim the deposit as forfeited (*s*). And if time be not of the essence of the contract, it seems that the vendor receiving notice of an act of bankruptcy by the purchaser may at once take the objection that the purchaser is not and will not at the time fixed for completion be capable of making a valid payment of the purchase money, and may repudiate the contract on this ground (*t*). But, as in the case of an act of bankruptcy by the vendor, when an act of bankruptcy by the purchaser has not been followed by any bankruptcy proceedings, and has ceased to be available against him, it is thought that he will be entitled to enforce the contract specifically or otherwise, unless in the meantime the vendor has become entitled to repudiate the contract, and, in the case of a sale where time is not of the essence of the contract, has repudiated the same (*u*). And in such case the vendor may safely complete the contract with the purchaser (*x*). Where the vendor has no notice of an act of bankruptcy committed by the purchaser, and the contract is executed by payment of the purchase money before the date of any receiving order against the purchaser, the transaction is expressly protected, and the trustee under an adjudication founded on that act of bankruptcy cannot recover the money back (*y*). And even if in such case the contract

(*r*) *Franklin v. Brownlow*, 11 Ves. 550.

(*s*) See above, p. 548; *Collins v. Stimson*, 11 Q. B. D. 142.

(*t*) See above, p. 548; *Collins v. Stimson*, ubi sup.

(*u*) See above, pp. 548, 549.

(*x*) See above, p. 549.

(*y*) See above, p. 550, n. *r*.

be completed after that date, and the vendor, without notice of the act of bankruptcy, receive from the purchaser any money or negotiable securities in payment of the price, he will obtain a perfectly valid title thereto under the general law (z).

Adjudication
of bankruptcy
against the
purchaser.

If the purchaser be adjudged bankrupt pending completion, the vendor ought to make application in writing to the trustee in the bankruptcy requiring him to decide whether he will disclaim the contract or not; for if the trustee do not disclaim the contract within twenty-eight days after the receipt of such an application or within such extended period as may be allowed by the Court, he will no longer be entitled to disclaim the contract *but shall be deemed to have adopted it* (a). These last words, as to the adoption of the contract, were added to the bankruptcy law by the Bankruptcy Act, 1883 (b), and they have not yet received any judicial interpretation. Apparently, their effect is to impose on the trustee, being so deemed to adopt the contract, the liability to fulfil it with the bankrupt's assets, but not to make the trustee otherwise personally liable on the contract (c). If so, it would seem that the purchaser's trustee in bankruptcy, on being so deemed to adopt the contract, would be liable to be sued on the contract by the vendor either for specific performance or for damages (d). If however the vendor make no application requiring the trustee to elect as to disclaimer of the contract, and the trustee allow the time otherwise limited to him for disclaiming onerous pro-

(z) See Wms. Pers. Prop. 542, 543, 16th ed.

(a) Stat. 46 & 47 Vict. c. 52, s. 55 (4).

(b) Apparently in consequence of the decision in *Re Sneezum*, 3 Ch. D. 463.

(c) See the arguments put forward in the Court of Appeal and the judgment of James, L. J., in the last-mentioned case: Williams's Bankruptcy Practice, 261, 262, 7th ed.

(d) See above, p. 552.

perty (*e*) to elapse without disclaiming the contract, it is not provided that the trustee shall be deemed to have adopted the contract; and in such case it does not appear that the trustee comes under any liability to perform it, or that the vendor can maintain any action thereon, either for specific performance or damages, against the trustee (*f*). But by the Bankruptcy Act, 1883 (*g*), the Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy. If the purchaser's trustee in bankruptcy do not disclaim the contract, the question arises whether the vendor can safely complete the contract with the trustee electing to adopt it. The Bankruptcy Act, 1883 (*h*), gives no express power to the trustee to perform the bankrupt's contracts generally. But the trustee is expressly empowered, with the permission of the committee of inspection, to bring any action or other legal proceeding relating to the property of the bankrupt (*i*), which includes the benefit of a contract made by the bankrupt (*k*); and by the former bankruptcy law the trustee was entitled to perform a contract entered into by the bankrupt, if he thought it would be beneficial to the creditors (*l*). It seems therefore that, as under the present Bankruptcy Act the purchaser's trustee may, with the permission of the committee of inspection, sue

(*e*) Above, p. 546, n. 1*a*.

(*f*) See *Re Smeaton*, 3 Ch. D. 463;
Holloway v. York, 25 W. R. 627.

(*g*) Stat. 46 & 47 Vict. c. 52,
s. 55 (5).

(*h*) Stat. 46 & 47 Vict. c. 52;

see sects. 56, 57: *Re Smeaton*,
3 Ch. D. 463, 473.

(*i*) Sect. 57 (2).

(*k*) Sect. 168.

(*l*) *Re Smeaton*, 3 Ch. D. 463,
472, 474.

the vendor for specific performance of the contract on the usual terms of paying the price, so he may well secure the same benefit on the same terms without litigation where the vendor is willing to carry out the contract (*m*); but it is thought that the trustee ought to obtain the permission of the committee of inspection before so performing the contract, and that the vendor cannot safely complete the contract unless this be done (*n*).

Insolvent purchaser when discharged from liability on the contract.

If before completion of the contract the purchaser should be adjudged bankrupt and obtain an order of discharge or should make a composition or a scheme of arrangement with his creditors approved under the Bankruptcy Act, 1890, it appears that he would be released from all liability under the contract, even though the trustee had not disclaimed the contract and the vendor had not proved in respect of the purchaser's liability (*o*).

Purchaser an undischarged bankrupt at the time of the contract.

If the purchaser were an undischarged bankrupt at the time when the contract of sale was made, and the vendor complete the contract and receive, in ignorance of that fact, any money or negotiable securities in payment of the price, the same cannot, of course, be recovered from him, whether the trustee in bankruptcy were entitled thereto or not (*p*). If, however, the vendor receive notice, before completion, of the purchaser's bankruptcy, it does not appear that he would obtain a good title to any money subsequently paid to him by the bankrupt in pursuance of the contract, unless the money had been acquired by the purchaser since the

(*m*) See the principle applied in *Stagg v. Medway Navigation Co.*, 1903, 1 Ch. 169.

(*n*) See *Re Fawcett*, 1900, 2 Q. B. 309.

(*o*) See above, p. 545.

(*p*) See *Wms. Pers. Prop.* 543, 16th ed.; *Collins v. Stimson*, 11 Q. B. D. 142.

commencement of the bankruptcy, and the trustee had not intervened to claim it (*q*). The purchaser, it seems, would be obliged to prove that this was the case, and, if he failed to discharge this obligation satisfactorily, the vendor could not safely complete the contract without the concurrence of the trustee (*r*).

The vendor may suffer the involuntary alienation of the land sold pending completion, not only in the event of his bankruptcy, but also if the land be taken in execution of a judgment against him (*s*). If this be done, either under a writ of *elegit* or by virtue of an order for the appointment of a receiver (*t*), and the writ or order be duly registered under the Land Charges Acts, 1888 and 1900 (*u*), the judgment creditor will acquire an indefeasible estate by *elegit* in the land, entitling him to hold the same until his debt be satisfied out of the rents and profits (*x*): and this will be a legal estate in the land sold, where the vendor's interest therein was legal (*x*). The judgment creditor further acquires a charge on the land so taken in execution for the amount of the judgment debt and interest (*y*), and may obtain an order for the sale of the debtor's interest in the land (*z*). And these rights of the creditor are not now affected or liable to be diminished in case the purchaser had no notice of the

Land taken
in execution
pending com-
pletion.

(*q*) See Pollock, B., *Collins v. Stimson*, 11 Q. B. D. 112, 144, as to the money, which in that case was the property of the trustee, being earmarked: *Expte. Dechamst.*, L. R. 7 Ch. 185, where note that the money had been acquired by the bankrupt after the bankruptcy.

(*r*) See above, p. 552.

(*s*) See Wms. Real Prop. 268 *sq.*, 21st ed.

(*t*) See *ibid.* 269 *sq.*, 292.

(*u*) Stats. 51 & 52 Vict. c. 51, ss. 4-6; 63 & 64 Vict. c. 26, s. 2 (1); see Wms. Real Prop. 274, 276, 21st ed.

(*x*) See *ibid.* 273, n. (*f*), 275.

(*y*) Stat. 1 & 2 Vict. c. 110, s. 13; see Wms. Real Prop. 271, 276, 21st ed.

(*z*) Stat. 27 & 28 Vict. c. 112, s. 4, amended by 63 & 64 Vict. c. 26, s. 5; see Wms. Real Prop. 275, 276, 21st ed.

judgment (*a*). The judgment creditor, however, takes the estate and interest so acquired by him in the land sold subject to the purchaser's equities therein under the contract (*b*). If the whole or any part of the purchase money should have been paid to the vendor prior to the registration of the writ or order of execution (before which time the judgment cannot now operate as a charge on the land or on any unpaid purchase money therefor (*c*)), the purchaser has priority in respect of the amount so paid over the creditors' interest in the land (*b*). If, however, the whole of the purchase money have not been paid before the registration of the writ or order, the judgment creditor becomes entitled to receive the amount remaining unpaid, or so much thereof as will satisfy the judgment debt; and the purchaser is bound and must take care to pay this amount to the creditor and not to the vendor (*d*). Any writ or order of execution and any delivery in execution of the land sold pending completion is void as against the purchaser unless the writ or order be duly registered in the Office of Land Registry under the Land Charges Act, 1888 (*e*); and the judgment does not operate as a charge on the land or any interest therein, or on the unpaid purchase money therefor, unless or until such registration takes place (*f*). But, as we shall see here-

(*a*) By the Judgments Act, 1839, no judgment, as against purchasers and mortgagees without notice thereof, should bind any hereditaments more extensively than a duly docketted judgment would have bound such purchaser or mortgagee before the Judgments Act, 1838; but this enactment was repealed by the Land Charges Act, 1900: see stats. 2 & 3 Vict. c. 11, s. 5; 63 & 64 Vict. c. 26, s. 5; Wms. Real Prop. 271—276, 521, 522, 21st ed.

(*b*) Sug. V. & P. 517, 518, 527; *Whitworth v. Gaugain*, 1 Ph. 728;

Lodge v. Lyseley, 4 Sim. 70.

(*c*) Stat. 63 & 64 Vict. c. 26, s. 2 (1); Wms. Real Prop. 274, 276, 21st ed.

(*d*) Sug. V. & P. 518, 527; *Forth v. Norfolk*, 4 Madd. 503, 505; *Re Pope*, 17 Q. B. D. 743.

(*e*) Stat. 51 & 52 Vict. c. 51, ss. 4—6.

(*f*) Stat. 63 & 64 Vict. c. 26, s. 2 (1). These provisions apply to writs or orders affecting any hereditaments of any tenure: and appear therefore to apply to writs of *fi. fa.* when used for seizing leaseholds, as well as writs of *elegit*: stats. 51 & 52 Vict. c. 51,

after (*g*), it is thought that, if the purchaser have notice that the land sold has been actually delivered in execution under an unregistered writ or order, he cannot safely disregard the fact; for the execution is valid as against the judgment debtor, and confers upon the judgment creditor an estate by *elegit* voidable, in default of registration, as against purchasers only, and it may be held that such delivery in execution is valid in equity as against a purchaser with notice thereof. Where the land sold is seized pending completion under process of execution which is valid, either at law or in equity, as against the purchaser, the judgment creditor must concur in the conveyance in order to convey his interest in the land sold, and receive and give a discharge for so much of the purchase money as is payable to him. The delivery in execution of any land, whether by writ of *elegit* or order appointing a receiver, is not an act of bankruptcy, so that in such cases the sale may be safely completed with the judgment creditor's concurrence (*h*). It appears that equitable execution issued by the appointment of a receiver in respect of a purchaser's interest in land under the contract for sale will not operate to give the judgment creditor any charge on the land, if the vendor should never become an absolute and a bare trustee for the purchaser. Such execution cannot therefore affect the

Execution
against the
purchaser.

s. 4; 63 & 64 Vict. c. 26, s. 6 (3); see Wms. Real Prop. 521, 522, 21st ed.

g. Below, Chap. XII, Sect. 2.

h. See stats. 46 & 47 Vict. c. 52, s. 4; 53 & 54 Vict. c. 71, s. 1. A debtor commits an act of bankruptcy if (amongst other things) execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

In this context "goods" includes all chattels personal, but not apparently chattels real: see stat. 46 & 47 Vict. c. 52, ss. 45, 168. If execution be levied on a debtor's leaseholds by writ of *fi. fa.*, and the sheriff hold them for twenty-one days, it is a question whether an act of bankruptcy is committed; and if so, a purchaser of the land could not safely complete his contract, even with the judgment creditor's concurrence: see above, p. 548.

vendor's right to rescind the contract for the purchaser's breach of one of the main duties thereby imposed on him (*i*). The subject of executions issued against the land sold pending completion is further discussed below, under the head of Searches (*k*).

Lunacy.

If either vendor or purchaser, having been sane when the contract was made, become of unsound mind before its completion, that does not avoid the contract, and an order for its specific performance may nevertheless be obtained (*l*). As, however, a person of unsound mind can make no valid conveyance or payment to another, who has notice of his mental condition (*m*), he cannot himself well perform the acts necessary to completion. But the effectual completion of the contract may be obtained in certain cases by means of an order under the Lunacy Acts, 1890 and 1891 (*n*). By these Acts, the Judge or a Master (*o*) in lunacy may by order authorise the committee of a lunatic to perform any contract relating to the property of the lunatic entered into before his lunacy (*p*); and in the case of persons of unsound mind, not being lunatics so found by inquisition, to whom the powers of management and administration given by the Act of 1890 apply (*q*), such of the powers

(*i*) See *Ridout v. Fowler*, 1904, 1 Ch. 658, 2 Ch. 93; above, pp. 505, 506, 529, 530, 538; and see above, p. 36; below, Chap. XVIII. § 2, XIX. § 1.

(*k*) Chap. XII. § 2.

(*l*) *Owen v. Davies*, 1 Ves. sen. 82; *Hall v. Warren*, 9 Ves. 605.

(*m*) Wms. Real Prop. 298, 299, 21st ed.; Wms. Pers. Prop.

95, 159, 16th ed.

(*n*) Stat. 53 Vict. c. 5, s. 120 (*i*).

(*o*) Stat. 54 & 55 Vict. c. 65, s. 27 (1), which enabled the jurisdiction of the judge in these respects to be exercised by the Masters; see *Re Browne*, 1894, 3 Ch. 412; *Re Langdale*, 1901, 1 Ch. 3.

(*p*) Stat. 53 Vict. c. 5, s. 120 (*i*).

(*q*) By stat. 53 Vict. c. 5, s. 116 (1), these powers apply—

(a) To lunatics so found by inquisition;

(b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of the Act;

(c) To every person lawfully detained as a lunatic though not so found by inquisition (see *Re Whalley*, 1906, 1 Ch. 565);

of that Act as are made exercisable by the committee of the estate shall be exercised by such person as the Judge or Master shall direct (*r*). And the committee of the estate, or such person as the Judge or Master approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the Judge or Master directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject (*s*). If the vendor become of unsound mind after the contract has been so far executed that he is a trustee for the purchaser within the meaning of the statutes authorising vesting orders to be made as to the estates of trustees (*t*), an order vesting the vendor's estate in the purchaser may be obtained under the Lunacy Act, 1890 (*u*).

If either party to the contract be a single woman, and marry pending completion, she is not, under the present law (*v*), disabled from enforcing or completing the contract by herself alone. If she should have made

Marriage of
either party
to the con-
tract.

(d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs (see *Re Browne*, 1894, 5 Ch. 412; *Re Spurling*, 1909, 1 Ch. 199);

(e) To every person as to whom it is proved to the satisfaction of the Judge in lunacy that he is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2,000*l.* in value, or that the annual income thereof does not exceed 100*l.*;

(f) To every person as to whom the Judge is satisfied that he is or has been a criminal lunatic, and continues to be insane and in confinement.

r Sect. 116 (2).

(s) Stat. 53 Vict. c. 5, s. 124, as amended by 54 & 55 Vict. c. 65, s. 27 (1).

(t) Above, pp. 536—538.

(u) Stat. 53 Vict. c. 5, s. 135; see *Re Cumming*, L. R. 5 Ch. 72;

Re Pagani, 1892, 1 Ch. 236.

(v) As to the effect of marriage on a woman's legal capacity at common law, see below, Chap. XVI.; Wms. Real Prop. 306 *sq.*, 21st ed.; Wms. Pers. Prop. 488, 16th ed.

no disposition of her interest in the contract by way of settlement, she will on marriage become entitled to the same as her separate property (*y*) and will be enabled to sue alone in respect thereof as if she were a *feme sole* (*z*). And she will be liable to be sued thereon without her husband being joined (*a*); although he will be liable on the contract to the extent of all property belonging to her which he shall have acquired or become entitled to from or through her, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him at law in respect of her ante-nuptial debts, contracts or wrongs (*b*), and he may be sued on the contract either alone or jointly with her accordingly (*c*). If she be the vendor, her estate in the land sold will become her separate property on marriage, unless otherwise disposed of by ante-nuptial settlement, and she will be able to convey the same to the purchaser without her husband's concurrence (*d*). In consequence of the inconvenient doctrine that the legal estate in land vested in a married woman as trustee does not become and cannot be conveyed as her separate property (*e*)—a doctrine intended to be remedied by the Married Women's Property Act, 1907 (*f*), which enabled a married woman to dispose as if she were a *feme sole* of real or personal property held by her as trustee or personal representative—it seems necessary to point out that when a vendor of land, being the beneficial owner thereof, is or pending completion becomes a married woman, the purchaser could not before that Act and

(*y*) Stat. 45 & 46 Vict. c. 75, ss. 1 (1), 2, 24.

(*z*) Sects. 1 (2), 12, 24.

(*a*) Sect. 13; and see sect. 19: *Jay v. Robinson*, 25 Q. B. D. 467; *Robinson v. Lyves*, 1891, 2 Q. B. 577.

(*b*) Sect. 14.

(*c*) Sect. 15: see *Beck v. Pierce*,

23 Q. B. D. 316.

(*d*) Sects. 1 (1), 2; *Re Drummond & Davie's Contract*, 1891, 1 Ch. 524.

(*e*) *Re Harkness & Allsopp's Contract*, 1896, 2 Ch. 358; see below, Chap. XVI.

(*f*) Stat. 7 Edw. VII. c. 18, s. 1 (1); see below, Chap. XVI.

cannot now require the concurrence of her husband in the conveyance on the ground that she became an absolute trustee for the purchaser at the time when the title was accepted (*g*). For in the first place, when a married woman is disposing of her separate property for her own use, she is not a trustee thereof within the meaning of this doctrine at any time prior to the execution of the contract by payment of the purchase money (*h*). And secondly, even admitting that she were an absolute trustee for the purchaser on acceptance of the title, she would, on payment of the price, become a *bare* trustee for him (*i*), and so might well make a conveyance to him on receipt of the purchase money by virtue of the power of conveyance given to married women, who are bare trustees, by the Trustee Act, 1893 (*k*). The marriage of a man does not, of course, affect his legal capacity. But on the marriage of either party to the contract, whether man or woman, the other party should inquire whether any settlement or agreement for a settlement has been made affecting the property sold or his or her interest in the contract (*l*); as if any such disposition should have been made, the contract can no longer be safely or properly completed with the lately married party alone, but the concurrence of the persons to whom his or her interest has been assigned must be obtained (*m*).

If, pending completion, either party to the contract have judgment of death or penal servitude pronounced or recorded against him in England, Wales or Ireland, upon any charge of treason or felony, he cannot, so long

Conviction of treason or felony.

(*g*) Above, p. 529.

(*h*) See *Re Brooke & Franklin's Contract*, 1898, 1 Ch. 647; above, pp. 505, 506.

(*i*) Above, p. 529.

(*k*) Stat. 56 & 57 Vict. c. 53, s. 16, replacing 37 & 38 Vict.

c. 78, s. 6; see *Re Howgate and Osborn's Contract*, 1902, 1 Ch. 451; below, Chap. XVI.

(*l*) 1 Dart, V. & P. 329, 5th ed.; 373, 6th ed.; 367, 7th ed.

(*m*) See above, pp. 135, 136.

as he remains a convict, bring any action on the contract either at law or in equity, or alienate any property (*u*); but all his property, including his interest in the contract or in the land sold, vests in the person appointed to be his administrator, who may sue or be sued on the contract, and has such powers of dealing with the convict's property as will enable him to complete the contract (*o*). Outlawry, which remains theoretically possible in criminal proceedings, would, if incurred by a party to the contract pending completion, involve his incapacity to enforce the contract and would raise obstacles to the completion in the forfeiture to the Crown of the profits of his real estate and of his goods and chattels (*p*). If, pending completion, either party to the contract become an alien enemy (*q*), he cannot enforce the contract whilst he remains so (*r*); unless indeed he be resident in this country under the King's protection.

Assignment
by a party to
the contract.

Assignment
by the vendor
of the land
sold.

We will now consider the effect of the assignment by either party to the contract of the land sold or of his beneficial interest in the contract. With regard to the assignment by the vendor of the land sold, this land being in equity the property of the purchaser as from the date of the contract for sale, the vendor is not entitled to make any disposition thereof pending the completion of the contract to any other person or otherwise in derogation or to the prejudice of the purchaser's rights under the contract (*s*); any such disposition by

(*u*) Stat. 33 & 34 Vict. c. 23, ss. 6-8; and see sect. 30.

(*o*) Sects. 9-14: *Carr v. Anderson*, 1903, 2 Ch. 279. The administrator of a convict has, however, no power to bar an estate tail vested in the convict: but the convict himself can execute a disentailing deed; *Re Gaskell & Walters' Contract*, 1906,

2 Ch. 1; see above, p. 532, n. (*p*); below, Chap. XVI.

(*p*) See below, Chap. XVI.; *Wms. Real Prop.* 48, 115, 301, 21st ed.; *Wms. Pers. Prop.* 96, 153, 160, 16th ed.

(*q*) See *Janson v. Driefontein*, 40 C. 1902, A. C. 484, 505, 506.

(*r*) See below, Chap. XVI.

(*s*) Above, pp. 504 *sq.*, 519.

the vendor of the land sold constitutes a breach of the contract, for which the purchaser may at once sue him at law, without making any offer to complete the contract or other formality (*t*), and the vendor may, as we have seen (*u*), be restrained by injunction from so parting with his estate in the land. If, however, the vendor do make any such alienation of the land sold, either for a legal estate to a volunteer, with or without notice of the contract for sale, or to a purchaser with notice of the contract (*v*), or for an equitable estate only to any person (*x*), the alienee takes subject to the purchaser's equities under the contract, may be joined as a party to an action for its specific performance, and may be ordered to convey his interest in the land to the purchaser in order to complete the sale (*y*). But if, upon such an alienation by the vendor, the alienee acquire a legal estate in the land sold for valuable consideration actually paid or executed in good faith without notice of the contract for the sale, he is entitled to hold this estate free from all equities of the purchaser, who has no remedy but to sue the vendor for compensation for his loss (*z*). And the alienee, taking in good faith and for the like valuable consideration is entitled to the same priority over the purchaser, not only where he has acquired the legal estate, but also where he has, before receiving notice of the contract for sale, acquired the best right to call for the legal estate. For instance, if A. were seised of lands in fee on trust for B., and B. contracted to sell the lands to C., and,

To purchaser
for value
without
notice.

(*t*) *Main's case*, 5 Rep. 20b; *Lovelock v. Franklyn*, 8 Q. B. 371; *Synge v. Synge*, 1894, 1 Q. B. 466, 471; see below, Chap. XVIII. § 2.

(*u*) Above, pp. 504 *sq.*, 519.

(*v*) *Dawson v. Ellis*, 1 J. & W. 524.

(*x*) See above, p. 476.

(*y*) Above, p. 528, n. 8; Fry, Sp. Perf. §§ 206, 207, 211, 2nd ed.

(*z*) See *Mansel v. Mansell*, 2 P. W. 678, 681; *Willoughby v. Willoughby*, 1 T. R. 763, 771—773; *Clemow v. Geach*, L. R. 6 Ch. 147; *Pitcher v. Rawlins*, L. R. 7 Ch. 259; *Care v. Care*, 15 Ch. D. 639; *Joseph v. Lyons*, 15 Q. B. D. 280; *Hodds v. Robinson*, ib. 288; *Synge v. Synge*, 1894, 1 Q. B. 466, 471.

pending completion of that contract and without notice thereof, the same lands were sold by B. to D., and the sale to D. were completed by payment of the purchase money, and the execution by A., at B.'s request, of an express declaration of trust in D.'s favour, it appears that C. would have no better equity than D. to insist on possession of the land (a). But it is to be observed that the protection obtained against the purchaser's prior equity by a subsequent alienee acquiring in good faith, for value and without notice, the legal estate or the best right to call for it, does not extend beyond the interest actually acquired for valuable consideration paid or executed before any notice of such equity has been received. If the vendor, pending completion, dispose of the land sold to a stranger for any valuable consideration which is wholly or in part executory, the alienee, though he has obtained the legal estate in good faith and without notice of the sale, cannot, if he afterwards receive notice thereof, safely perform for the vendor's use any part of the consideration then remaining unexecuted. Thus, if the vendor, pending completion of the original sale, re-sell the land and convey the legal estate therein to another without receiving payment of the whole price, the second purchaser is protected against the first purchaser's prior equity as regards so much of his purchase money as he has paid before receiving notice of the first sale, and is entitled to hold his legal estate as security for the amount so paid. But after he has received such notice he cannot safely pay the rest of his purchase money; for he will not be entitled to set up *his* contract of sale as specifically enforceable against the first purchaser, and, as between himself and the

(a) See *Wilkes v. Badington*, 2 Vern. 599; *Widdoughby v. Widdoughby*, 1 T. R. 763, 767—772; *Stanhope v. Verney*, 2 Eden, 81; *Wilmut v. Pike*, 5 Hare, 14, 21—23; *Perham v. Kempster*, 1907, 1 Ch. 373, 378.

vendor, that contract will be rescinded and he will be discharged from all further performance of his obligations thereunder (*b*). If the vendor, pending completion of the contract, convey an equitable estate in the land sold for valuable consideration to some third person, the alienee cannot, after receiving notice of the contract for sale, protect himself against the purchaser's claim by taking a conveyance of the legal estate from the vendor, or from an express trustee thereof for the vendor (*c*). But otherwise the alienee is entitled to tack his own equitable interest to the legal estate if he can obtain it without any breach of trust on the part of the conveying party, so that if the legal estate in the property be outstanding in a mortgagee the alienee, on taking a transfer of the mortgage, even after receiving notice of the sale, can exclude the purchaser's rights (*d*).

Tacking by
vendor's
alienee.

The purchaser is, as we have seen (*c*), fully entitled to dispose of the land sold as his own, at any time after the making of the contract for sale.

Alienation by
the purchaser
of the land
sold.

(*b*) *Jones v. Standley*, 2 Eq. Ca. Abr. 685, pl. 9; *Storg v. Woodson*, 2 Atk. 639; *Hardingham v. Nicholls*, 3 Atk. 304; *Toureville v. Naish*, 3 P. W. 307; Sug. V. & P. 789. In the last case a purchaser who had taken a conveyance and given a bond for the balance of the price without notice of a prior equitable incumbrance, and received notice thereof prior to payment of the money due on the bond, was postponed to the incumbrancer, as regards such money, on the ground that he would be entitled in equity to avoid payment of the money on the bond. The giving of a bond or covenant for payment of the whole or part of the purchase money may, perhaps, be properly treated as not constituting executed consideration within the meaning of the rule stated above,

as any assignee of the debt so secured would take subject to the equities between the debtor and original creditor. But if the sale were made on the terms that a negotiable security should be given for the unpaid purchase money, it appears that the giving of such security ought to be treated as executed consideration, at least where the security has been negotiated before notice of the prior equity is received; for after the negotiable security has come to the hands of a *bonâ fide* holder for value the liability thereon can no longer be avoided.

(*c*) Above, p. 480, n. (i); *Pulter v. Sanders*, 6 Hare, 1.

(*d*) *Taylor v. Russell*, 1892, A. C. 244; *Barley v. Barnes*, 1894, 1 Ch. 25, 26, 37; above, pp. 477—480.

(*e*) Above, pp. 506, 541.

Assignment
of the benefit
of the con-
tract.

Either party to the contract may lawfully assign over his beneficial interest therein (*f*), and the assignee may sue the other party in his own name in equity for the specific performance of the contract, making the assignor a party to the action (*g*); and this is the case whether the assignment of the benefit of the contract be made for the purpose of absolutely transferring the assignor's whole interest or of securing some lesser or other advantage to the assignee, such as the repayment of money lent (*h*). And the assignee of the interest of either party to the contract is entitled, under the Judicature Act of 1873, to sue the other party thereon in his own name at law if the assignment were an absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only), and express notice in writing of such assignment were given to the other party (*i*). Notice of the assignment by either party of the benefit of the contract must, of course, be given to the other party, in order to prevent him from further performing the contract for the

(*f*) *Wood v. Griffith*, 1 Swanst. 43, 55, 56; Sug. V. & P. 356; *Shaw v. Foster*, L. R. 5 H. L. 321, 333, 338; *Tolhurst v. Associated Portland, &c. Ltd.*, 1903, A. C. 414, 420, 423.

(*g*) *Nelthorpe v. Holgate*, 1 Coll. 203; and see *Crosbie v. Tooke*, 1 My. & K. 431; *Morgan v. Rhodes*, ib. 435; *Dowell v. Dew*, 1 Y. & C. C. C. 345, 358; 12 L. J. (N. S.) Ch. 158, 162, 165; *Buckland v. Papillon*, L. R. 1 Eq. 477, 2 Ch. 67; Fry, Sp. Perf. § 222, 3rd ed.

(*h*) *Browne v. London Necropolis Co.*, 6 W. R. 188; *Shaw v. Foster*, L. R. 5 H. L. 321, 333, 338—344, 350.

(*i*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 6; *Turkington v. Magee*, 1902, 2 K. B. 427, reversed on the facts, 1903, 1 K. B. 644; and see *Dawson v. Great Northern Ry.*, 1905, 1 K. B.

260, 270, 271. It has been decided that where there is an absolute assignment of the chose in action (in the sense of a complete transfer of the legal ownership thereof), the assignee may sue in his own name, although the assignment be made to secure the payment of money, and be subject to a proviso for redemption on such payment: *Tancred v. Delagoa Bay, &c. Rail. Co.*, 23 Q. B. D. 239; *Durham v. Robertson*, 1898, 1 Q. B. 765; *Hughes v. Pump House, &c. Co.*, 1902, 2 K. B. 190; cf. *Mercantile Bank of London v. Evans*, 1899, 2 Q. B. 613; *Jones v. Humphreys*, 1902, 1 K. B. 10; or although the assignment be made on trust for the assignor: *Comfort v. Betts*, 1891, 1 Q. B. 737; *Fitzroy v. Cave*, 1905, 2 K. B. 361.

assignor's own use, which he would otherwise be entitled to do. And, as a rule, when one party to the contract receives notice of the assignment by the other of his interest in the contract, he is thenceforth bound to continue the performance of his part of the contract in favour of the assignee, and must no longer give to the assignor the benefit of the contract (*k*). But in order to oblige the other party to cease performance in favour of the original contractor, and to complete the contract with the assignee, there must be an effectual assignment of the original contractor's interest and notice of such assignment, and the assignee must show himself ready and willing to take the assignor's place in all respects, accepting the burthen, as well as the benefit, of the contract (*l*). Thus, where a purchaser of leaseholds deposited his contract with his bankers, together with a written agreement that he would at any time thereafter, at their request, execute to them a valid assignment of the contract, and the bankers gave formal notice to the vendor of the terms of this agreement only, not mentioning the deposit of the contract or expressing any intention to stand in the purchaser's place as regards its completion, and took no further steps to secure to themselves the benefit of the sale, it was considered that the terms of the agreement amounted, not to a present assignment of the benefit of the contract, but only to a promise to assign the same at a future time upon request; and it was held that the vendor was justified in executing, on payment of the purchase money by the original purchaser, a conveyance which took no notice of any interest on the banker's part (*m*).

(*k*) *Shaw v. Foster*, L. R. 5 1902, 2 K. B. 427, reversed on
H. L. 321, 333, 338, 339, 350; the facts, 1903, 1 K. B. 644.
Wms. Pers. Prop. 56, 16th ed.

(*l*) *Shaw v. Foster*, L. R. 5
d See *Torkington v. Mayes*, H. L. 321.

As to the burthen of the contract after an assignment.

Of course, neither party to the contract can assign over the burthen thereof (*u*). It follows that when one party to the contract has assigned his interest therein he remains liable to perform his part of the contract; and the other party cannot sue the assignee, either for the specific performance or for damages for breach of the contract (*o*), unless he has accepted the assignee as occupying the assignor's place, in respect of the fulfilment of the contract. In this case there appears in truth to be a novation of the contract, and the assignor is not a necessary or proper party to any action thereon (*p*).

Transfer of part of the benefit of the contract.

If a party to the contract make no direct assignment, either legal or equitable, of his whole interest in the contract, but merely transfer by some independent act or agreement a part of the benefit which he is to derive from its performance—as if the vendor merely charge the purchase money with the payment of some smaller amount, or the purchaser agree to sell a part or to lease the whole or a part of the land sold—the transferee, being no party to the contract and being unable to assert an absolute assignment to himself of the original contractor's interest within the meaning of the Judicature Act of 1873, is not entitled to sue the other party to the original contract in his own name at law (*q*).

(*u*) *Tollhurst v. Associated Portland Cement Manufacturers*, 1902, 2 K. B. 660, 668, affirmed, 1903, A. C. 414.

(*o*) *Chadwick v. Madden*, 9 Hare, 188.

(*p*) *Holden v. Haypi*, 1 Mer. 47; *Hall v. Laver*, 3 Y. & C. 191.

(*q*) See above, p. 568: *Mercantile Bank of London v. Evans*, 1899, 2 Q. B. 613; *Jones v. Humphreys*, 1902, 1 K. B. 10. It is

a question whether an absolute assignment by the vendor of part of the purchase money would enable the assignee to sue the purchaser at law; but the better opinion appears to be that it would not: see *Brice v. Bannister*, 3 Q. B. D. 569; *Durham v. Robertson*, 1898, 1 Q. B. 765, 769—775, and the two cases cited above; *Skipper v. Holloway*, 1909, W. N. 230, 79 L. J. K. B. 91, reversed on the facts, 1910, W. N.

But, in equity, one who has acquired from an original contractor a derivative interest in the subject-matter of a contract which is specifically enforceable, may claim, as against his grantor and the other party to the contract, to be an assignee *pro tanto* of the benefit of the contract, and to have the same specifically performed in his own favour accordingly. Thus, in *Browne v. London Necropolis Co. (r)*, a vendor of land assigned a portion of the purchase money by way of mortgage, the mortgagee deposited this mortgage with another by way of sub-mortgage, and the sub-mortgagee sued the purchaser, his own mortgagor and the vendor, claiming, as against the purchaser, the specific performance of the contract. Wood, V.-C., held that the suit was maintainable in this form, considering that any person who was an assignee of the vendor might assert the vendor's rights under the agreement to purchase, and thus obtain the benefit of his charge through the medium of specific performance. The same rule appears to be applicable in the case of the acquisition by a third person from the purchaser of an estate or interest in the land sold. But to obtain such relief the person claiming it must submit to perform the original contract, so far as any duty thereby created relates to the interest acquired by him in the subject-matter of the agreement, and he must also procure the whole of the obligations undertaken by his assignor in the contract to be completely discharged (*s*). For a contractor cannot, by a partial any more than by a complete (*t*) assignment of his

*Browne v.
London Necro-
polis Co.*

74: 1910, 2 K. B. 630; *Bowles v. Baker*, 1910, W. N. 24, 110, 119; nom. *Forster v. Baker*, 1910, 2 K. B. 630.

(*r*) 6 W. R. 188, where, however, specific performance was refused on other grounds.

(*s*) *Dyer v. Poltrey*, Barn. Ch. 160, 169, 170; *Shaw v. Foster*, L. R. 5 H. L. 321, 333, 338, 339,

350, 357, 358; and see *South Eastern Rail. Co. v. Knott*, 10 Hare, 122; *Fenwick v. Bulman*, L. R. 9 Eq. 165, where note that *Browne v. London Necropolis Co.* was not cited; *Government of Newfoundland v. Newfoundland Rail. Co.*, 13 App. Cas. 199, 210—213.

(*t*) Above, p. 570.

interest under the contract, deprive the other party to the contract of his right to have the same performed in its entirety (*u*); and he can only enforce specific performance by the other party on the terms of carrying out his own part of the agreement (*x*).

Contract specifically enforceable against persons whose estate would be displaced by a conveyance.

Here it may be mentioned that contracts for sale of land are specifically enforceable, not only against the vendor's representatives in law and his assigns, who have or are taken to have notice of the contract, but also, as a rule, against all persons having any estate or interest in the land sold which would be displaced by the vendor's conveyance in pursuance of the contract (*y*). Thus, a contract for sale by a joint tenant of his share of the land is specifically enforceable against the other joint tenants claiming the estate by survivorship, the contract for sale operating in equity as a severance of the joint tenancy (*z*). And a contract for sale properly entered into by a trustee for or with power of sale is so enforceable against the *cestui-que-trusts* (*a*); but this is not the case if the circumstances were such as to make it a breach of trust for the trustee to enter into the contract (*b*). And where a trustee authorised to invest the trust funds in the purchase of land has entered into a contract of purchase in such circumstances as to constitute a breach of trust, the contract is not specifically enforceable by the vendor against the *cestui-que-trusts*, notwithstanding that they have been in possession of the

(*u*) Above, n. (*s*), p. 571.

(*v*) Fry, Sp. Perf. § 922 *sq.*, 3rd ed.

(*y*) 2 Dart, V. & P. 997, 5th ed.; 1117, 6th ed.; 1031, 7th ed.; see above, pp. 538, 539.

(*z*) *Hinton v. Hinton*, 2 Ves. sen. 631, 634; *Brown v. Raindle*, 3 Ves. 256, 257.

(*a*) *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; *Mortlock v. Buller*, 10 Ves. 292, 314; *Dowell v. Dew*, 1 Y. & C. C. C. 345; above, pp. 256 *sq.*

(*b*) See *Mortlock v. Buller*, 10 Ves. 292, 313; *White v. Cuddon*, 8 Cl. & Fin. 766; *Maw v. Topham*, 19 Beav. 576, 578.

land under the contract or with the vendor's leave, and the vendor's only remedies to obtain payment of the purchase money are to sue the trustee at law and to enforce his vendor's lien (c).

(c) *Ecclesiastical Commrs. v. Pinney*, 1899, 2 Ch. 729, 1900, 2 Ch. 736. From what was said in the judgments in this case it appears that the vendor would not have had any remedy to obtain payment of the purchase money from the *cestui-que-trusts* or out of the trust fund if the contract had not been a breach of trust.

CHAPTER XII.

OF THE COMPLETION OF THE CONTRACT.

- § 1. Of Completion generally.
- § 2. Of Searches and Inquiries.
- § 3. Of the Preparation of the Conveyance.
- § 4. Of the Adjustment of Accounts.
- § 5. Of the Execution of the Conveyance.

§ 1.—*Of Completion generally.*

AFTER the investigation of title is completed, the purchaser either accepts the title and proceeds to completion, or he objects to the title and claims that the vendor has failed to perform that part of the contract. In the latter case the vendor either admits the purchaser's claim or disputes it, when the parties must pursue their legal remedies. But if the purchaser accept the title, the contract is either duly completed or it fails to be performed either for non-payment of the purchase money or else for some reason which is not precisely a matter arising upon the investigation of title, as that the contract was induced by mistake or by misrepresentation as to some fact, or by fraud, duress or undue influence, or cannot or ought not to be performed by reason of the incapacity of some party thereto or of the relation in which the parties stand to each other. Of course, any of these matters may be alleged as a ground for avoiding the contract before or during the investigation of title. But as the plan of this treatise has been to take the normal course of a contract for the sale of land, and to describe the incidents thereof as they occur in order of time, we

will first examine the cases in which the contract is duly completed, and will consider afterwards the various grounds on which the contract may be avoided.

Let us now approach the subject of the completion of the contract in its ordinary course. And first, as to the time for completion. As we have seen (*a*), if when the investigation of title is concluded the vendor has shown a good title according to the contract, the purchaser is bound to accept the title and complete the contract accordingly. Under an open contract, the time for completion is when the vendor has shown a good title (*b*): but it is usual in formal contracts for the sale of land to fix a date for completion (*c*). When this is done, time is not, as a rule, of the essence of the contract, either in equity or, since the Judicature Acts commenced, at law (*d*). This rule, however, is subject to certain exceptions. The principle to which these exceptions are referable is the same as that on which the rule itself is founded (*e*). As the Court will enforce the specific performance of a contract, notwithstanding the failure to comply with some stipulation as to time, where it considers that the real intention of the parties was not to make the condition as to time material (*f*), so the Court will not order the specific performance of a contract after breach of a stipulation as to time, where the intention appears, either expressly or impliedly, that the observance of the time stipulation shall be an essential part of the contract (*g*). A stipulation, therefore, that a contract for the sale of land shall be completed on a particular day will be of the essence of the contract, if such were the intention of the parties; and this inten-

(*a*) Above, pp. 35, 46, 163, 179.

(*b*) Above, pp. 35, 46.

(*c*) Above, p. 57.

(*d*) Above, pp. 58, 59; *Patrick v. Milner*, 2 C. P. D. 342.

(*e*) See *Hipwell v. Knight*, 1 Y. & C. 401.

(*f*) Above, pp. 58, 59.

(*g*) See the cases cited above, p. 58; *Patrick v. Milner*, 2 C. P. D. 342.

tion may be either expressed or implied. An express intention to make time of the essence of the contract is best shown by providing (in these terms) that time shall be of the essence of the contract as regards the particular act required to be done within a given time (*h*): but such an intention may also be gathered from other expressions in the contract (*i*). It must, however, be clearly shown, or the general rule of construction, that time is not of the essence of an agreement to complete a sale of land on a given day, will be applied (*k*). With regard to the implication of an intention to make time of the essence of a contract to complete a sale of land on a particular day, we have seen (*l*) that such an intention may be inferred from the nature of the property or from the surrounding circumstances. Thus, time is of the essence of the contract where the value of the property sold must necessarily increase or diminish according to the effluxion of time (*m*), as in the case of sales of remainders or reversions other than those expectant merely on a lease at a profitable rent (*n*), of estates or interests determinable with life (*o*), or of mining leases or short leaseholds (*p*). So, where the property is used for trade or business purposes, time is generally of the essence of the contract (*q*), as on the purchase of a public-house (*r*), mill or manufactory as a going concern, or of mines for the purpose of working them (*s*). But in all these cases the question whether time is material

(*h*) *Lloyd v. Ripplingale*, cited 1 Y. & C. 410; *Parkin v. Thorold*, 16 Beav. 59, 65; see above, pp. 62, 72.

(*i*) *Hipwell v. Knight*, 1 Y. & C. 401, 417; *Barclay v. Messenger*, 43 L. J. N. S. Ch. 449, 455.

(*k*) Above, p. 575; *Webb v. Hughes*, L. R. 10 Eq. 281, 286.

(*l*) Above, p. 59.

(*m*) *Hipwell v. Knight*, 1 Y. & C. 401, 416.

(*n*) Above, p. 408.

(*o*) See *Withy v. Cattle*, T. & R. 78; 1 Dart, V. & P. 419, 5th ed.; 484, 6th ed.; 497, 7th ed.

(*p*) *Hudson v. Temple*, 29 Beav. 536, 543.

(*q*) *Coslake v. Till*, 1 Russ. 376; *Walker v. Jeffreys*, 1 Hare, 341, 348.

(*r*) Above, p. 488.

(*s*) *Parker v. Frith*, 1 S. & S. 199, n.; *Machynle v. Weekes*, 22 Beav. 533; Fry, Sp. Perf. §§ 1079—1082, 3rd ed.

is to be determined by ascertaining the intention of the parties (*t*); and if it appear from the contract that they contemplated delay in completion after the day fixed therefor, as where the payment of interest in case of delay in completion is expressly provided for (*u*), it will not be considered that compliance with the time stipulation is essential (*x*). As to inferring an intention to make time of the essence of the contract from the surrounding circumstances, this may be illustrated by the case of a contract to sell a house for the purpose of residence (*y*), or to sell land for erecting a mill or factory (*z*), or for any other immediate purpose (*a*): but it does not appear that such an intention will be inferred where the vendor does not expressly or impliedly offer the property as available for the required purpose and the purchaser does not disclose to him what use he desires to make of it (*b*). An express or implied stipulation that time shall be of the essence of the contract may be waived either by express agreement or by the conduct of the parties, as where they continue negotiations as to title after the day fixed for completion (*c*).

As we have seen (*d*), where time is not originally of the essence of the contract, it may be made so, in the case of unreasonable delay by either party in the performance of his part of the contract, by a notice served on him by the other party and requiring him to do the acts, which he has so delayed to perform, within a specified time; provided that the time so specified allow him

Making time of the essence, where not originally so, by subsequent notice.

(*t*) Above, p. 575.

(*u*) Above, pp. 67, 74.

(*x*) *Webb v. Hughes*, L. R. 10 Eq. 281, 286; *Patrick v. Milner*, 2 C. P. D. 342; and see *Jones v. Gardiner*, 1902, 1 Ch. 191.

(*y*) *Lery v. Lindo*, 3 Mer. 81, 84; *Gedye v. Montruse*, 26 Beav. 45; *Tilley v. Thomas*, L. R. 3 Ch. 61.

(*z*) See *Wright v. Howard*, 1

S. & S. 190.

(*a*) See *Jones v. Gardiner*, 1902, 1 Ch. 191.

(*b*) See *Boehm v. Wood*, 1 J. & W. 419, 422; *Tilley v. Thomas*, L. R. 3 Ch. 61, 67, 70; *Webb v. Hughes*, L. R. 10 Eq. 281, 286.

(*c*) *Hipwell v. Knight*, 1 Y. & C. 401; *Webb v. Hughes*, L. R. 10 Eq. 281.

(*d*) Above, p. 48.

such a period commencing from the date of service of the notice as is reasonably necessary for accomplishing the acts required.

Time for performance by vendor of a condition which is a term of the sale.

Here it may be mentioned that, if it be a term of the contract for sale that some condition shall be performed by the vendor, as that he shall procure a mortgagee of the land to allow the amount advanced to remain on the security, and a day be fixed for completion, time being of the essence of the contract in this respect, the vendor may, as a rule, well perform the condition at any time before the day fixed for completion (*e*).

The acts to be performed on either side for completion.

Completion of the contract consists on the part of the vendor in conveying with a good title the estate contracted for in the land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execution, accepting such conveyance, taking possession and paying the price (*f*). But the performance of either party's duty in this respect cannot be exacted by the other unless he himself be ready to fulfil his own part of the contract. Thus the vendor cannot require payment of the price and call upon the purchaser to take possession unless and until he have shown a good title and be ready and willing to execute a valid conveyance to the purchaser; nor can the purchaser oblige the vendor to convey and give up possession of the land without himself accepting the title, tendering a conveyance for execution, accepting the conveyance and paying the price. And this is so, not only under an open contract, but also where a day is fixed for completion in the ordinary way, time not being of the essence of the contract; either party being at liberty in such case to decline to complete the

(*e*) *Smith v. Butler*, 1900, 1 Q. B. 694, 699. (*f*) Above, pp. 26, 33, 34, 46.

contract, notwithstanding that the day for completion arrive or be past, except on the terms of the other discharging his duty (*g*).

Let us first consider the purchaser's duties. The first step towards completion required of him is to accept the title, if the title shown on the abstract and proved by the documents and other evidence produced for verification of the abstract be a good title according to the contract (*h*). No formal act or notification of such acceptance is required; it takes place when the vendor's last answer to the purchaser's last outstanding requisition is received without objection (*i*). Such acceptance, however, is merely an acceptance of the title so put forward by the vendor (*k*); it does not preclude objection to the title on account of defects subsequently discovered from other sources than the information supplied by the vendor, as from searches or other inquiries made by the purchaser (*l*), provided of course that the title agreed to be taken were not so limited by special stipulation as to preclude such objection (*m*). Neither does acceptance of the title prevent objections as to matters which are properly matters of conveyance rather than of title (*n*). It is important to observe this, as a part of the proper investigation of every title consists in searching for registered incumbrances, making inquiries of tenants or other occupiers as to the nature

The purchaser's duties.

Acceptance of the title.

Searches and inquiries to be made by the purchaser.

(*g*) See *Martin v. Smith*, 6 East, 555; *Jones v. Mudd*, 4 Russ. 118; *Poole v. Hill*, 6 M. & W. 835; *Talley v. Thomas*, L. R. 3 Ch. 61; *Phillips v. Silvester*, L. R. 8 Ch. 173, 176, 178; *Noble v. Edwards*, 5 Ch. D. 378; *Mostyn v. Mostyn*, 1893, 3 Ch. 376; above, pp. 60, 515, 516.

(*h*) See above, pp. 35, 36, 105, 115, 143, 166, 178, 179.

(*i*) See cases cited above, pp. 26, n. (*r*), 60, n. (*t*); *Re Highett and Bird's Contract*, 1902, 2 Ch. 214,

1903, 1 Ch. 287.

(*k*) Above, p. 189.

(*l*) Above, pp. 189, 190; *Re Jackson and Oakshott*, 14 Ch. D. 851; *Re Manckton and Gelzean*, 27 Ch. D. 555; *Re Hardicks and Lipski's Contract*, 1901, 2 Ch. 666, 669, 670; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*m*) Above, pp. 202—207.

(*n*) Above, pp. 164—166, 181, 188, 190; *Mostyn v. Mostyn*, 1893, 3 Ch. 376; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595.

Acceptance
by not
sending in
requisitions
in time.

Soper v.
Arnold.

of their interests, or, where vacant possession is to be given on completion, ascertaining that the vendor is in possession; and these searches and inquiries should be so made as to extend over the very latest possible time before completion (*o*). And it may happen that an objection as to some matter of conveyance may be such as to justify the purchaser in refusing to complete the contract (*p*). We have seen (*q*) that the title may also be accepted by not sending in requisitions or objections within the time specially limited by the contract for that purpose. If the purchaser inadvertently accept a defective title put forward without fraud, and afterwards fail to pay the purchase money and the vendor rescind the contract and retain the deposit as forfeited on that account (*r*), the purchaser will not be enabled, on subsequently discovering the defect in the title, to recover the deposit (*s*).

§ 2.—Of Searches and Inquiries.

Searches,
their object.

The object of searching for incumbrances or other matters, which are registered or enrolled, is to ascertain that the vendor's title is not adversely affected by any judgment, Crown debt, writ or other process of execution, life annuity, land charge, *lis pendens*, bankruptcy, deed of arrangement, disentailing assurance, deed acknowledged before the year 1883 by a married woman entitled at common law, or by registration of the title or any registered disposition under the Land Transfer Acts, 1875 and 1897 (*t*), or in the case of lands in Middlesex or Yorkshire, by any disposition thereof

(*o*) Sug. V. & P. 538; Dart, V. & P. 454, 499, 5th ed.; 516 *sq.*, 569, 6th ed.; 1191, 1227, 7th ed.

(*p*) Above, pp. 165, 166, 181, 182; *Mostyn v. Mostyn*, 1893, 3 Ch. 376.

(*q*) Above, pp. 179—182.

(*r*) See above, pp. 26, 36, 57, 74.

(*s*) *Soper v. Arnold*, 37 Ch. D. 96, 14 App. Cas. 429.

(*t*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

already registered (*u*), or in the case of copyholds by any assurance already enrolled (*x*).

With regard to judgments and Crown debts of record or by specialty in statutory form or arising from public accountants to the Crown, all of which at one time were, when registered, charges on the debtor's lands (*y*), it is now provided by the Land Charges Act, 1900 (*z*), that a judgment (*a*) or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, either before or after the commencement of the Act (*b*), shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under the Land Charges Act of 1888 (*c*); and this provision applies to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment (*d*). Under the same Act (*e*) too, no entry shall be made, except under an order of the High Court, in the register of judgments established by the Judgments Act, 1838 (*f*), the register of Crown debts established by the Judgments Act, 1839 (*g*), the registers of writs of execution established by the Law of Property Amendment Act, 1860 (*h*), and the Judgments Act, 1864 (*i*), or the register of Crown process of

Judgments,
Crown debts
and writs of
execution.

(*u*) Above, pp. 373 *sq.*

(*x*) See Wms. Real Prop. 268 . 294, 602—605, 21st ed.

(*y*) Ibid. 269—275, 285—287.

(*z*) Stat. 63 & 64 Vict. c. 26, s. 2 (1).

(*a*) Here including any order or decree having the effect of a judgment, except an order made by a Court having bankruptcy jurisdiction in exercise of that jurisdiction: see sect. 6 (3); stat. 51 & 52 Vict. c. 51, s. 4.

(*b*) 1st July, 1901; stat. 63 & 64 Vict. c. 26, s. 6 (2).

(*c*) Stat. 51 & 52 Vict. c. 51.

(*d*) Stat. 63 & 64 Vict. c. 26, s. 2 (2); see Wms. Real Prop. 285—287, 21st ed.

(*e*) Sect. 2 (3).

(*f*) Stat. 1 & 2 Vict. c. 110, ss. 19, 21.

(*g*) Stat. 2 & 3 Vict. c. 11, s. 8.

(*h*) Stat. 23 & 24 Vict. c. 38.

(*i*) Stat. 27 & 28 Vict. c. 112.

execution established by the Crown Suits Act, 1865 (*k*). And all these registers, as well as the registers of *lis pendens* and life annuities (*l*), have been transferred from the Central Office of the Supreme Court to the Office of Land Registry (*m*). As regards writs or other processes of execution, we have seen (*n*) that, by the Land Charges Act of 1888 (*o*), every writ or order affecting land (including hereditaments of any tenure) issued or made by any Court for the purpose of enforcing a judgment (*p*), and every delivery in execution or other proceeding taken in pursuance of any such writ or order shall be void, as against a purchaser for value (*q*) of the land, unless the writ or order is for the time being duly registered against the name of the person whose land is affected in the Office of Land Registry. This enactment was extended by the Land Charges Act, 1900 (*r*), to every writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of the Act, and to every delivery in execution or proceeding taken in pursuance of any such writ or order. Registration under these Acts ceases to have effect at the expiration of five years, but may be renewed, and if renewed has effect for five years from the date of renewal (*s*). With regard, therefore, to judgments, Crown debts or liabilities of the kind mentioned in the Land Charges Act, 1900, and process of execution, whether at suit of the Crown

(*k*) Stat. 28 & 29 Vict. c. 104 ; see Wms. Real Prop. 271—275, 286, 21st ed.

(*l*) See below, pp. 587, 593.

(*m*) Stat. 63 & 64 Vict. c. 26, s. 1; and Order thereunder, W.N. 18th Aug. 1900.

(*n*) Above, p. 558.

(*o*) Stat. 51 & 52 Vict. c. 51, ss. 4—6.

(*p*) Above, p. 581, n. (*a*).

(*q*) Including a mortgagee or lessee, or other person who for valuable consideration takes any interest in or a charge on land: sect. 4.

(*r*) Stat. 63 & 64 Vict. c. 26, s. 3.

(*s*) Stat. 51 & 52 Vict. c. 51, s. 5 (3).

or of a common person, the purchaser need only now ascertain that no writ or order affecting the land sold has been registered or re-registered within the last five years; and if this be so, and the possession of the lands sold be in accordance with the title shown, he may safely complete the purchase (*t*). But if any such writ or order be registered, the purchaser must not complete without the concurrence of every person entitled thereunder to any interest in the land (*u*). And this is the case whether such writ (*x*) have been followed by actual delivery in execution or not, as the effect of the Land Charges Act, 1900 (*y*), read together with the unrepealed provisions of the Judgments Act, 1838 (*z*), appears to be that a judgment shall operate as a charge on the judgment debtor's lands, when the writ or order enforcing it has been registered under the Land Charges Act of 1888 (*a*), actual delivery in execution being no

t. It cannot now be necessary, as regards judgments suffered or Crown debts incurred before the commencement of the Land Charges Act, 1900, to search in any of the registers closed as above mentioned: p. 581. If before that Act any such judgments or debts were charges on any lands without the lands having been actually delivered in execution (as might happen in the case of a judgment entered up before the 23rd July, 1860, and kept alive by payment of interest or otherwise, or a Crown debt incurred before the 2nd Nov. 1865), it appears that on the commencement of that Act they ceased to be charges, unless or until a writ or an order to enforce them had been or should be registered. If the lands had been actually delivered in execution prior to that Act, it appears that, by virtue of sect. 3 of the Act (above, p. 582), unless the land had been already sold under the Judgments Act, 1864, it

became necessary on the commencement of the Act of 1900 to register the writ or other process of execution, and that in default of such registration the delivery in execution would be void as against the purchaser. But the purchaser must ascertain that the possession of the land sold is in accordance with the title shown, because he is deemed to have notice of the interests of all persons in occupation thereof, and it may be held that, if the purchaser have notice of a delivery in execution under an unregistered writ or process, the same is valid in equity as against him: see below, p. 584.

(*u*) See above, pp. 557—560.

(*x*) An order appointing a receiver is of itself equivalent in equity to actual delivery in execution: below, p. 585, n. (i).

y) 63 & 64 Vict. c. 26, s. 2.

(*z*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*a*) Stat. 51 & 52 Vict. c. 51.

Notice of judgments, or Crown debts of record or by specialty or public accountantship.
Crown debts by simple contract.

Notice of unregistered process of execution.

longer a condition precedent to the lien of a judgment (*b*). So Crown debts of the kind included in the Land Charges Act, 1900 (*c*), have the binding effect on the debtor's lands which was given to them by common law or early statute (*d*), so soon as a writ or order for the purpose of enforcing them is registered. But as no charge now arises in the case of Crown debts of this kind, or of judgments, until registration of the writ or order, the purchaser will not be adversely affected by notice or knowledge of any of these Crown debts incurred by or any judgments against the vendor or his predecessors in title, so long as the purchase is completed before such registration takes place. Debts due to the Crown by simple contract and not arising from the above-mentioned accountantships (*e*) did not, under the old law, give rise to any lien on the debtor's lands until they were made of record for the purpose of enforcing them (*f*); and they do not now give rise to such a lien. The purchaser may therefore safely disregard these liabilities of the vendor, notwithstanding that he have notice of them; they could only affect him if his purchase were made, not in good faith, but with intent to defraud the Crown (*g*). With regard to unregistered process of execution against lands, it is to be observed that the same is made void only as against purchasers for value (*h*). The actual delivery of any lands in execution, under an unregistered writ of *elegit* or receiving order, still vests in the judgment creditor

(*b*) Under the Judgments Act, 1864, no judgment thereafter entered up affected any land until actually delivered in execution. But this enactment was repealed by the Land Charges Act, 1900: see stats. 27 & 28 Vict. c. 112, s. 1; 63 & 64 Vict. c. 26, s. 5; Wms. Real Prop. 274, 21st ed.

(*c*) See above, p. 583, n. (*y*); and p. 581.

(*d*) See Wms. Real Prop. 285, 21st ed.

(*e*) Above, p. 581.

(*f*) *R. v. Smith*, Wightw. 34; *Casberd v. A.-G.*, 6 Price, 411, 473—476; Chitty on the Prerogative of the Crown, 293—296; Sug. V. & P. 545.

(*g*) Sug. V. & P. 545.

(*h*) Above, p. 582.

an estate by *elegit*, which is valid as against the judgment debtor himself, his representatives in law and assigns by voluntary conveyance (*i*). It appears therefore that the actual delivery in execution under unregistered process of lands sold, whether made before or pending the completion of the contract for sale, is an objection to the title, the estate sold being partly vested in some person, whom the vendor has no right to direct to convey to the purchaser (*k*); and it seems by analogy to the rule applied under the old law as to the sale of lands already parted with by voluntary conveyance (*l*), that the vendor could not enforce the specific performance of the contract, upon the ground that conveyance to the purchaser would render the execution void. Nor could the purchaser himself be advised to rely upon this ground and accept the title, if he had notice of the

(i) See above, p. 559. The estate by *elegit* vests in the judgment creditor, in the case of execution under a writ of *elegit*, when he has got the sheriff's return to the writ, and in the case of equitable execution by the appointment of a receiver, when the order for a receiver is made. In the case of an *elegit*, the sheriff delivers to the judgment creditor symbolical not actual possession of the land; but the latter, when tenant by *elegit*, may, if the land were in the occupation of a tenant, distrain for rent subsequently becoming due without any attornment by such tenant. And if the land were in the judgment debtor's own occupation, the tenant by *elegit* may obtain actual possession thereof by peaceable entry or by action: see *Hoe's case*, 5 Rep. 89b; *Taylor v. Cole*, 3 T. R. 292, 295; *Rogers v. Pitcher*, 6 Taunt. 202, 206, 207; *Sharp v. Key*, 8 M. & W. 379; *Lloyd v. Davies*, 2 Ex. 103; *Hughes v. Lumley*, 4 E. & B. 274; *Guest v. Cowbridge Ry. Co.*, L. R. 6 Eq. 619; *Hatton v. Haywood*,

L. R. 9 Ch. 229, 236; *Re Pope*, 17 Q. B. D. 743, 745, 751; *Re Anthony*, 1892, 1 Ch. 450; *Johus v. Pink*, 1900, 1 Ch. 296. It is submitted that the case of *Re Hobson*, 33 Ch. D. 493, if well decided, which is doubtful, lays down no more than this: that the symbolical delivery of land by the sheriff under an *elegit* may be equivalent to a "seizure" thereof within the meaning of sect. 45 (2) of the Bankruptcy Act, 1883. It appears that a judgment creditor, who has obtained actual delivery in execution of the judgment debtor's lands under unregistered process, is entitled to obtain an order for sale under the Judgments Act, 1864 (stat. 27 & 28 Vict. c. 112), s. 4, as the words in that enactment which required registration of the process of execution as a condition precedent to obtaining an order for sale were repealed by the Land Charges Act, 1900 (stat. 63 & 64 Vict. c. 26), s. 5.

(k) Above, pp. 164—166.

(l) Above, p. 395, n. (i).

execution; for it may be argued that, on the principle applied in the case of unregistered conveyances of lands in Middlesex or Yorkshire (*m*), of undocketed judgments under the old law (*n*), and of unregistered life annuities under the Judgments Act, 1855 (*o*), executions actually put in force against lands under unregistered process are valid in equity as against purchasers who have notice of the same. Until this point be precisely decided, the purchaser should, it is conceived, refuse to complete in such a case, except with the concurrence of every person interested by virtue of the execution in the land sold (*p*).

Orders made
in exercise of
bankruptcy
jurisdiction.

It will have been observed (*q*) that the provisions of the Land Charges Acts, 1888 and 1900, do not apply to orders made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction. Such orders, if made for the payment of any sum of money, or any costs, charges or expenses, appear to have the effect of a judgment (*r*), and therefore to operate as a charge on the lands of the person ordered to pay (*s*): but all the enactments which rendered registration of the order or of the writ of execution or actual delivery in execution a condition precedent to such lien have been repealed (*t*). Such orders may be made, for example, where one who has contracted with a person afterwards adjudged bankrupt applies in the bankruptcy for rescission of the

(*m*) Above, p. 373: Wms. Real Prop. 212, 21st ed.

(*n*) *Davis v. Strathmore*, 16 Ves. 419; Sug. V. & P. 521.

(*o*) *Greaves v. Tufield*, 14 Ch. D. 563. The language used in the Judgments Act, 1855, is different from that used in the Land Charges Act, 1888. But *Greaves v. Tufield* was expressly decided on the principle applied in construing the Middlesex and Yorkshire Registry Acts, of which the language closely resembles

that of the Land Charges Act, 1888.

(*p*) See above, pp. 557—559.

(*q*) Above, p. 581, n. (*a*).

(*r*) See stats. 1 & 2 Vict. c. 110, s. 18; 46 & 47 Vict. c. 52, ss. 52, 93, 100; R. S. C. 1883, Orders 42 (rr. 3, 24, 28), 43 (r. 1); Bankruptcy Rules, 1886, r. 93.

(*s*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*t*) Stat. 63 & 64 Vict. c. 26, s. 5.

contract and is ordered to pay damages or costs (*u*). There do not appear to be any means of discovering whether lands sold are affected by a liability of this kind.

Annuities or rent-charges which may affect purchasers of land are of two kinds, those granted in exercise of the ordinary right of alienation incident to ownership, and those created under statutory authority, generally for the purpose of securing the repayment of money advanced for the improvement of land. Of annuities of the former kind, those granted on or after the 26th of April, 1855, otherwise than by marriage settlement or will, for a life or lives or for any estate determinable on a life or lives, are required to be registered, formerly in the Court of Common Pleas and now in the Office of Land Registry, in order to affect the lands charged therewith as against purchasers (*x*). Life annuities so required to be registered are, however, valid in equity, though unregistered, as against purchasers who have notice of them (*y*). Annuities or rent-charges of the former kind, other than those so required to be registered, of course take effect according to their nature; if legal, they will affect the lands charged in the purchaser's hands; if equitable, the purchaser will take the lands free from them, only so far as he can claim under a conveyance of the legal estate made in

Annuities or
rent-charges.

Notice of life
annuities.

(*u*) Above, p. 555. An example of an appeal made by a contractor with a bankrupt to bankruptcy jurisdiction and dismissed with costs against him occurs in *Re Bastable*, 1901, 2 K. B. 518.

or Stat. 18 & 19 Vict. c. 15, ss. 12, 11: above, pp. 437, 582. Annuities for or determinable on any life or lives, granted for valuable consideration, and not secured on lands of equal or greater value than the annuity, and belonging to the grantor for

an estate in fee or in tail in possession, were formerly made void by statute, unless a memorial thereof were duly enrolled in the Court of Chancery: stats. 17 Geo. III. c. 26; 53 Geo. III. c. 141; 3 Geo. IV. c. 92; 7 Geo. IV. c. 75. But these statutes were repealed by the Act abolishing the Usury Laws: stat. 17 & 18 Vict. c. 90.

y *Greaves v. Tofteld*, 14 Ch. D. 563.

good faith and for executed valuable consideration without notice of them, and not otherwise (*z*). If any such rent-charges exist, they ought to be stated on the abstract (*a*): but if not so disclosed, they are not generally discoverable either by any search, or by the absence of the title deeds, as a person having a rent only is not entitled to the custody of the title deeds of the land charged therewith (*b*).

Land charges. With regard to rent-charges of the latter kind, those coming under the description of a land charge (*c*) in the Land Charges Act of 1888 (*d*), and created after that year, are void as against a purchaser for value (*e*) of the land charged therewith, unless registered in the register of land charges at the Office of Land Registry. And rent-charges coming under the same description and created before the year 1889, but assigned over by act *inter vivos* after the year 1888, are not recoverable after the expiration of one year from the first of such assignments, as against a purchaser for value (*e*) of the land charged therewith, unless registered in the same register (*g*). As it may be contended that land charges so required to be registered are valid in equity as against purchasers who have notice of them (*h*), purchasers cannot be advised to disregard any such charges, though not registered, of which they have notice. Land improvement charges created by the authority of statute before the year 1889 were not declared to be void, as against purchasers, if not registered: but some of them were required to be registered and are discoverable by search. Thus, charges created under the Public Money

Notice of
unregistered
land charges.

Land
improvement
charges
created before
1889.

(*z*) Above, pp. 565—567; *Chambers v. Gratch*, L. R. 6 Ch. 147.

(*a*) See above, pp. 105, 176.

(*b*) Wms. Real Prop. 462, 13th ed.; 598, 21st ed.

(*c*) Stated above, p. 437, n. (*a*).

(*d*) Stat. 51 & 52 Vict. c. 51, s. 12.

(*e*) Above, p. 582, n. (*g*).

(*g*) Sect. 13.

(*h*) See above, p. 586, and n. (*v*).

Drainage Acts (*i*), the Private Money Drainage Act, 1849 (*k*), or the Improvement of Land Act, 1864 (*l*), before the year 1889, were registered against the name of the landowner affected thereby at the office of the Inclosure Commissioners, afterwards styled the Land Commissioners (*m*), whose powers and duties were in the year 1889 transferred to the Board of Agriculture (*n*), at whose office the search for such charges should be made (*o*). Land improvement charges created under the General Land Drainage and Improvement Company's Act (*p*), the Lands Improvement Company's Acts (*q*), or the Land Loan and Enfranchisement

i These charges were to be made by certificate of the Inclosure Commissioners, and to consist of rent-charges payable for twenty-two years: stats. 9 & 10 Vict. c. 101 (see s. 34), amended by 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 12 & 13 Vict. c. 100, ss. 30, 31 (repealed by 27 & 28 Vict. c. 114); 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.

k These consist of rent-charges payable for twenty-two years and granted by certificate of the Inclosure Commissioners, and, if charged on lands in Middlesex or York, were to be registered in the county register: stat. 12 & 13 Vict. c. 100 (see ss. 10, 14), amended by 19 & 20 Vict. c. 9, and repealed by 27 & 28 Vict. c. 114.

l These were to be made by absolute order of the Inclosure Commissioners creating a rent-charge for the term thereby fixed, not exceeding twenty-five years: stat. 27 & 28 Vict. c. 114 (see ss. 26, 49), amended by 62 & 63 Vict. c. 46, and extended by 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84 to the erection, completion or improvement of limited owners' residences; by 40 & 41 Vict. c. 31 to waterworks; by 45 & 46 Vict. c. 38, s. 30, to all improvements authorised by the Settled Land Act, 1882; and by 60 & 61 Vict.

c. 44 to the supply of water to a rural district. Under the Act of 1864 (sect. 56) the rent-charges thereby created were required to be registered in the Office of Land Registry: but the words requiring this were repealed by stat. 62 & 63 Vict. c. 46, s. 5, which also prohibited any entry or search from being made in any register kept at the Office of Land Registry under sect. 56 of the Act of 1864, except under an express order of the High Court. This does not appear to prohibit search at the Office of the Board of Agriculture.

m Stat. 45 & 46 Vict. c. 38, s. 48.

n Stat. 52 & 53 Vict. c. 30.

o See Elphinstone & Clark on Searches, 109—112; above, n. *l*.

p These were to be created by absolute order of the Inclosure Commissioners: stat. 12 & 13 Vict. c. xci. (see s. 56) (local and personal).

q These were to be created by absolute order of the Inclosure Commissioners charging the lands by way of annuity for not more than twenty-five years; and, if affecting lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 16 & 17 Vict. c. cliv. (see ss. 48, 54), amended by 18 & 19 Vict.

Company's Act (*r*) may also be discovered by search at the office of the Board of Agriculture, as well as by search at the companies' offices respectively (*s*). Charges under the Artisans' and Labourers' Dwellings Acts, 1868 to 1882 (*t*), in favour of owners who themselves completed the works required under the Acts by the local authority, had to be recorded and may be discovered by search at the office of the Clerk of the Peace for the county in which the lands affected lie; where also may be found evidence of any charges created under the Landowners Drainage and Improvement Company's Act (*u*) and the Landowners West of England and South Wales Land Drainage Company's Act (*x*). Charges under the Sewers Amendment Act, 1833 (*y*), will be found registered in the Court of Sewers, if any, for the district; or if made by a drainage board constituted under the Land Drainage Act, 1861 (*z*), at the

c. lxxxiv.; 22 & 23 Vict. c. lxxxii.; and 26 & 27 Vict. c. cxl. (local and personal Acts).

(*r*) These are rent-charges for terms not exceeding twenty-five years created by absolute order of the Inclosure Commissioners, and, if affecting lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 23 & 24 Vict. c. clxix. (see ss. 37, 38, 47), amended by 23 & 24 Vict. c. exciv. (local and personal).

(*s*) Elphinstone & Clark on Searches, 117—119.

(*t*) These charges were made by order of the local authority charging the lands with an annuity for thirty years, and, if affecting lands in Middlesex or Yorkshire, were required to be registered in the county register. Where the local authority themselves executed the works, the costs, charges and expenses so incurred might be charged on the lands by order of the Court

of Quarter Sessions: see stats. 31 & 32 Vict. c. 130 (see ss. 19, 25—20); 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63 and 64; 43 Vict. c. 8; 45 & 46 Vict. c. 54; all repealed by the Housing of the Working Classes Act, 1890 (stat. 53 & 54 Vict. c. 70): see ss. 36, 37, as to charging orders in favour of owners completing works themselves, which are to be registered in Middlesex or Yorkshire in the county register.

(*u*) Stat. 10 & 11 Vict. c. cexii.

(*x*) Stat. 11 & 12 Vict. c. cxlii.; this company was ordered to be wound up in 1874: see *Landowners West of England, &c. Co. v. Ashford*, 16 Ch. D. 411, 424; Elphinstone & Clark on Searches, 119, 120.

(*y*) These are made by a decree or Ordinance of the Commissioners of Sewers and are payable by instalments over a period not exceeding fourteen years: stat. 3 & 4 Will. IV. c. 22 (see s. 41).

(*z*) Stat. 24 & 25 Vict. c. 133, s. 67.

office of the Board (*a*). Rent-charges granted under the Public Health Act, 1875 (*b*), for securing the repayment of money advanced for private improvement expenses, are required to be registered and may be discovered by search at the office of the local authority. There are also some cases in which charges authorised by Local Improvement Acts are required to be registered (*c*).

Amongst land improvement rent-charges which did not before the year 1889 require any registration of any kind, are those created under stat. 8 & 9 Vict. c. 56 (*d*). Various local Acts have also authorised the creation of rent-charges to repay money advanced for improvements, without the requirement of registration (*e*).

Besides the land improvement charges payable by way of terminable annuity, there are other statutory charges on land of some principal sum not so payable; and these were not required to be registered. Among such charges are those given by the Public Health Act, 1875 (*f*), to secure the repayment with interest of the amount of the expenses incurred by any local authority under the Act (*g*), for the repayment whereof the owner

Land improvement charges not requiring registration before 1889.

Statutory charges on land of a principal sum, not payable by way of annuity.

(*a*) Elphinstone & Clark on Searches, 114, 115.

(*b*) These are granted by the local authority by way of rent-charge for a term not exceeding thirty years: stat. 38 & 39 Vict. c. 55, ss. 240, 241.

(*c*) As those created under the Improvement of Buildings Act, 1860 (c. exxix.), as to lands in Middlesex, the Bradford Water-works and Improvement Act, 1875 (c. lxxx.), and the Leeds Improvement Act, 1877 (c. clxxviii.), where registration in the county register is required; Elphinstone & Clark on Searches, 121, 123.

(*d*) Enabling the repayment, by instalments extending over not

more than twenty-five years, of moneys expended in the improvement of settled estates to be charged thereon with the sanction of the Court of Chancery; but apparently seldom resorted to: Elphinstone & Clark on Searches, 115.

(*e*) See Elphinstone & Clark on Searches, 121 *sq.*

(*f*) Stat. 38 & 39 Vict. c. 55, s. 257: see *Corpn. of Birmingham v. Baker*, 17 Ch. D. 782; *Re Bettsworth and Richer*, 37 Ch. D. 535; *Re Smith's Settled Estates*, 1901, 1 Ch. 689: above, pp. 177, 521, 522.

(*g*) As in sewerage, paving or lighting private streets under sect. 150 of the Act.

of the premises, for or in respect of which the expenses were incurred, is made liable either under the Act or by agreement with the local authority. Similar charges have been created by various local Acts, sometimes by express words, sometimes impliedly, as by giving power to distrain for the amount due (*h*). The charges given under the Agricultural Holdings (England) Act, 1883 (*i*), to a landlord who had paid to a tenant compensation under that Act and where the landlord was not entitled for his own benefit, also required no registration.

What are *land charges* created after 1888.

It appears that all the land improvement rent-charges created after the year 1888, at the instance of the owners of the land under any of the above-mentioned Acts, come within the description of land charges contained in the Land Charges Act of 1888 (*k*), and must be registered accordingly in order to be effectual as against a purchaser for value of the land charged. So, it seems, must any other land improvement charge effected under the same Acts at the instance of the owner of the land, but not payable by way of annuity (*l*). The above-mentioned charge given by the Agricultural Holdings (England) Act, 1883, in favour of a landlord, who had paid compensation, was expressly included in the definition of a land charge given in the Land Charges Act of 1888 (*m*). And by an Act of 1890 (*n*) it was provided

(*h*) See Elphinstone & Clark on Searches, 121 *sq.*; above, pp. 177, 521, 522.

(*i*) Stat. 46 & 47 Vict. c. 61, ss. 29, 31.

(*k*) Above, pp. 437, n. (*a*), 588. It is conceived that where the charges are created by order or certificate of the Inclosure Commissioners, Land Commissioners, or Board of Agriculture or other body, given under statutory authority, they are not charged by deed

within the meaning of sect. 4 of the Land Charges Act, 1888, though such order or certificate be directed to be made under hand and seal: see above, pp. 588—591.

(*l*) See *R. v. Vice-Registrar of Office of Land Registry*, 24 Q. B. D. 178.

(*m*) Above, pp. 437, n. (*a*).

(*n*) Stat. 53 & 54 Vict. c. 57, s. 3.

that the charge given by the Agricultural Holdings Act of 1883, where the landlord was not entitled for his own benefit, should be a land charge within the meaning of the Land Charges Act of 1888, and should be registered accordingly. And similar charges created under the Agricultural Holdings Act, 1908 (*o*), are also made land charges under the Act of 1888 and required to be registered in the same manner. But it has been held that the charges given by sect. 257 of the Public Health Act, 1875 (*p*), and similar charges imposed by statute on lands against their owner's will (*q*), are not land charges within the meaning of the Land Charges Act of 1888 (*r*), and do not, since that Act, require to be registered (*s*). A charge similar to that given by sect. 257 of the Public Health Act, 1875 (*p*), was authorised by the Private Street Works Act, 1892 (*t*): but a register of these charges is required to be kept by the urban authority.

With regard to the other matters above referred to (*u*) *Lis pendens*, in enumerating the objects of searches:—Under the Judgments Act, 1839 (*x*), no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof unless registered and re-registered every five years in the Office of Land Registry. The purchaser should therefore search the register of pending suits for the last five years to find out if any legal proceedings affecting the property sold are entered therein. And as he will be bound by the result of any action at law

(*o*) Stat. 8 Edw. VII. c. 28 (which consolidated and repealed the Act of 1883 and its amending Acts, s. 19; see ss. 15–18, 35; Wms. Real Prop. 532, 533, 21st ed.

(*p*) Above, p. 591.

(*q*) Above, pp. 177, 521.

(*r*) Above, p. 437, and n. (*a*).

(*s*) *R. v. Registrar of*

Office of Land Registry, 24 Q. B. D. 178.

(*t*) Stat. 55 & 56 Vict. c. 57, s. 13; *Stock v. Manley*, 1900, 1 Ch. 683; above, pp. 177, 521.

(*u*) Above, p. 580.

(*x*) Stats. 2 & 3 Vict. c. 11, s. 7; 42 & 43 Vict. c. 78; R. S. C. 1883, Order 61; above, p. 581.

or in equity affecting the property sold, which is so registered, or of which, though not so registered, he has *express notice* (*y*), he should, if any such action be proceeding, refuse to complete without the concurrence of all persons asserting therein any apparently well-founded claim on the property. It should be noted, however, that registration or express notice of a *lis pendens* against the vendor is not necessarily notice of an incumbrance on the land sold, for the suit in question may not affect the land (*z*). It is merely notice of a claim, and makes it necessary for the purchaser to inquire into the nature of the claim. And if the claim sought to be enforced be such as would create no charge on the land sold, the purchaser cannot refuse to complete the contract (*a*). Where the land sold is situate in either of the counties palatine of Lancaster and Durham, the index of pending suits in the Palatine Courts (*b*) must also be searched (*c*).

Lands in
Lancashire or
Durham.

Bankruptcy. Searches in bankruptcy are of course made to discover if the title to the lands sold has been affected by reason of their vesting under bankruptcy proceedings against the vendor or some former owner, either in the trustee in the bankruptcy or in the trustee appointed to carry out a composition or scheme of arrangement approved by the Court (*d*). By the Deeds of Arrangement Act,

Deeds of
arrangement.

(*y*) Co. Litt. 344 b; *Anon.*, 1 Vern. 318; *Hiern v. Mill*, 13 Ves. 114, 120; *Bellamy v. Sabham*, 1 De G. & J. 566; *Price v. Price*, 35 Ch. D. 297.

(*z*) See above, p. 224.

(*a*) *Bull v. Hutchens*, 32 Beav. 615.

(*b*) See Wms. Real Prop. 277 and n. (*p*), 21st ed.

(*c*) Stat. 18 & 19 Vict. c. 15, s. 3.

(*d*) See above, pp. 546—550; stats. 46 & 47 Vict. c. 52, s. 44; 53 & 54 Vict. c. 71, s. 3 (16, 17). An order of adjudication in bank-

ruptcy does not require to be registered in Middlesex in order to pass the lands there situate to the trustee: *Re Calcott and Elvin's Contract*, 1898, 2 Ch. 460. But as to land in Yorkshire, it appears that under the Yorkshire Registries Act, 1884, a trustee in bankruptcy must register the order of adjudication in order to secure for himself priority over all persons who might claim under a subsequent registered conveyance from the debtor; see stat. 47 & 48 Vict. c. 54, ss. 3, 4, 6 (3), 14; above, p. 377, and n. (*z*).

1887 (*e*), any of the following instruments made in respect of the affairs of a debtor for the benefit of his creditors generally (*f*) (otherwise than in pursuance of the bankruptcy law for the time being in force) shall be void, unless registered in the Central Office of the Supreme Court (*g*) within seven days after the first execution thereof by the debtor or any creditor (*h*), and unless stamped in accordance with the Act; that is to say, an assignment of property, or deed of or agreement for a composition, deed of inspectorship, letter of licence, and any agreement or instrument entered into for the purpose of carrying on, winding up, or disposing of a debtor's business with a view to the payment of his debts. And by the Land Charges Act of 1888 (*i*), every such deed of arrangement, whether made before or after the commencement of that Act, shall be void as against a person becoming after the year 1888 a purchaser for value (*k*) of any land comprised therein or affected thereby, unless registered in the Office of Land Registry. Search in bankruptcy and for deeds of arrangement should never be omitted where it is known or there is reason to suspect that the vendor or any former owner is or has been in embarrassed circumstances (*l*); and having regard to the difficulties occasioned where bankruptcy proceedings have taken place

(*e*) Stat. 50 & 51 Vict. c. 57, amended as to Ireland by 53 & 54 Vict. c. 24; see rule thereunder, W. N. 7 July, 1888.

(*f*) See *Re Saumarez*, 1907, 2 K. B. 170.

(*g*) In Ireland the place of registration is the Bills of Sale Office of the King's Bench Division: stat. 50 & 51 Vict. c. 57, s. 8.

(*h*) Others may execute the deed after registration: *Re Batton*, *Ex parte Maber*, 22 Q. B. D. 685. Instruments executed out of England or Ireland may be

posted within one week after execution, and registered within seven days after arrival in the ordinary course of post: see stat. 50 & 51 Vict. c. 57, s. 5.

(*i*) Stat. 51 & 52 Vict. c. 51, ss. 2, 4, 7—9. Such a deed need not, since the passing of the Land Charges Act, 1900, be registered in the Middlesex Registry: stat. 63 & 64 Vict. c. 26, s. 4.

(*k*) Above, p. 582, n. (*g*).

(*l*) See *Cooper v. Stephenson*, 16 Jur. 424, 21 L. J. Q. B. 292.

Disentailing
assurances.

Deeds
acknow-
ledged.

unknown (*m*), it appears desirable to search in bankruptcy on every sale. And the same remark applies to searching for deeds of arrangement. Search for disentailing assurances is only necessary where the title depends on the fact of some estate tail, vested in a person of full age, *not* having been barred. It is only requisite to search for certificates of the acknowledgment of deeds by married women where title is made through some married woman entitled to the land sold at common law, and there is reason to suppose that some disposition, inconsistent with the abstracted title, has been made by her before the year 1883 by deed acknowledged (*n*) and has been suppressed (*o*). Both these searches are now made, as to assurances under the Fines and Recoveries Act, 1833 (*p*), at the Central Office of the Supreme Court (*q*); whilst the records of fines and recoveries are preserved in the Public Record Office (*r*). The object of searching, on the sale of unregistered land, in such of the registers established by the Land Transfer Acts, 1875 and 1897 (*s*), as are open to public inspection, is to discover whether the title to the land sold has been or is about to be registered under those Acts. This may be ascertained at the Office of Land Registry by inspection of the index map and search in the list of pending applications kept there. Such inspection and search should certainly be made on every sale of unregistered land situate in a district where registration of title is compulsory on sale (*t*); and, having regard to the effect of registration under these Acts in extinguishing title (*u*), it is no doubt a prudent

(*m*) See the cases cited above, pp. 551, 552, nn. (*a*), (*o*).

(*n*) See stat. 45 & 46 Vict. c. 39, s. 7; Wms. Real Prop. 311 and n. (*c*), 21st ed.

(*o*) 1 Dart, V. & P. 499, 5th ed.; 568, 6th ed.

(*p*) Stat. 3 & 4 Will. IV. c. 74.

(*q*) Stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Order 61, r. 9.

(*r*) Established by stat. 1 & 2 Vict. c. 94.

(*s*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; Land Transfer Rules (1898), 12, 14; Wms. Real Prop. 671, 672, 21st ed.

(*t*) Above, p. 380.

(*u*) See Wms. Real Prop. 643—648, 21st ed.

precaution to take on any sale. But until voluntary registration of title becomes more common than it has hitherto been, the risk practically run in omitting this search, on the purchase of land not situate in a compulsory registration district, will not be great. If it should be found that the title to the land sold has been registered, the purchaser must of course take the steps requisite on a purchase of registered land to acquire a transfer of the estate to himself. The object and necessity of search in the Middlesex and Yorkshire Registries on the purchase of lands situate in those counties sufficiently appears from what has been said above concerning such sales (*x*). The Court Rolls should be searched on the sale of copyholds (*y*) for similar reasons.

Search in
Middlesex and
Yorkshire
Registries.

Copyholds.

It appears, then, that the searches which should usually be made on the purchase of land are the following:—

What searches
should usually
be made.

1. In the Office of Land Registry for writs and orders affecting land registered or re-registered within the last five years (*z*). 1. Writs and orders affecting land.
2. In the same office for any *lis pendens* registered or re-registered within the last five years (*a*). And where the lands sold are situate in Lancashire or Durham, for *lis pendens* so registered or re-registered in the Lancaster or Durham Court of Chancery (*b*). 2. *Lis pendens*.
3. In the Office of Land Registry for registered life annuities (*c*). 3. Life annuities.
4. If there is reason to suspect that the vendor or some former owner is or has been in embarrassed circumstances, then certainly, but advisably on every sale, for adjudications of bankruptcy, 4. Bankruptcy.

(*x*) Above, pp. 373 *sq.*

(*y*) Above, p. 346.

(*z*) Above, pp. 580—587.

(*a*) Above, pp. 593, 594.

(*b*) Above, p. 594.

(*c*) Above, p. 587.

receiving orders, schemes of arrangement, and compositions under the Bankruptcy Act, 1883 (*d*); and where it is necessary to go back so far, for adjudications or liquidations by arrangement under the Bankruptcy Act, 1869 (*e*), or any previous Bankruptcy Act (*f*), or for insolvency (*g*). These searches are made in the registers kept at the Bankruptcy Court in London (*h*). Receiving orders and adjudications are required to be advertised in the *London Gazette* (*i*).

5. Deeds of arrangement.

5. In the same circumstances, but advisably on every sale, at the Office of Land Registry for deeds of arrangement registered there (*k*).

6. For registration of title.

6. On sale of land situate in a district where registration of title is compulsory on sale, but as a prudent precaution (though perhaps the caution is excessive) on every sale, at the Office of Land Registry in the index map and list of pending applications (*l*).

7. Land charges.

7. On sale of land which is or has within the last twenty-five years been agricultural land (*m*), or may otherwise be subject to some land improvement charge (*n*), in the Office of Land Registry for land charges registered there (*o*), and also, until by the effluxion of time land charges created prior to the year 1889 must have ceased to affect lands, for land charges so created and registered elsewhere (*p*).

8. Middlesex or Yorkshire Register.

8. On purchase of land situate in Middlesex or

(*d*) Above, pp. 594, 595.

(*e*) Stat. 32 & 33 Vict. c. 71.

(*f*) See Wms. Pers. Prop. 238, 241, 254, n. (*d*), 16th ed.

(*g*) Ibid. 277; Wms. Real Prop. 279, 21st ed.

(*h*) Elphinstone and Clark on Searches, 98, 100, 101.

(*i*) Stat. 46 & 47 Vict. c. 52, ss. 13, 20 (2), 132.

(*k*) Above, p. 595.

(*l*) Above, p. 596.

(*m*) See above, pp. 177, 588—593.

(*n*) See above, pp. 588—593.

(*o*) Above, pp. 588, 589.

(*p*) Above, pp. 589—591.

Yorkshire, in the county register for any registered assurance affecting the land (*q*).

9. On purchase of copyholds, in the Court Rolls, for any enrolled assurance affecting the land purchased (*r*).

9. Court
Rolls.

10. On the purchase of land from a company registered under the Companies Act, 1862 (*s*), or the Companies (Consolidation) Act, 1908, at the office of the Registrar of Joint Stock Companies in the register established there by the Companies Acts, 1900 (*t*) and 1907 (*u*) and the Companies (Consolidation) Act, 1908 (*x*), of the mortgages and charges created after the year 1900 by any such company for any of the purposes mentioned in those Acts. Where a *limited* company is the vendor the purchaser should also inspect the company's register of all mortgages

10. On purchase of land from a company.

(*q*) Above, p. 597.

(*r*) Above, p. 597.

(*s*) Stat. 25 & 26 Vict. c. 89.

(*t*) Stat. 63 & 64 Vict. c. 48, s. 14.

(*u*) Stat. 7 Edw. VII. c. 50, s. 10.

(*x*) Stat. 8 Edw. VII. c. 69, s. 93, whereby every mortgage or charge created after the 1st of July, 1908, by a company registered in England or Ireland and being either (1) for the purpose of securing any issue of debentures, or 2 on uncalled capital of the company, or (3) created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale, or (4) on any land, wherever situate, or any interest therein, or (5) on any book debts of the company, or 6 a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the

company, unless registered as therein required within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured. This section replaced stat. 7 Edw. VII. c. 50, s. 10, which by s. 52 (3) came into operation on the 1st July, 1908, and replaced with amendments stat. 63 & 64 Vict. c. 48, s. 14, containing similar provisions but not extending to mortgages or charges made for purposes (4) and (5) above mentioned or saving the contract or obligation for repayment. See *Re Harrogate Estates, Ltd.*, 1903, 1 Ch. 498; *Cornbrook, &c. Co. v. Law Debenture Corpn.*, 1904, 1 Ch. 103; *Illingworth v. Houldsworth*, 1904, A. C. 355; *Re Yolland, &c., Ltd.*, 1908, 1 Ch. 152; *Bristol United Breweries, Ltd. v. Abbot*, ib. 279; *Re New London, &c. Co.*, ib. 621; *Canard Steamship Co. v. Hopwood*, 1908, 2 Ch. 564; *Wilson v. Kelland*, 1910, 2 Ch. 306.

and charges specifically affecting its property (*y*). And, as by the Companies (Consolidation) Act, 1908 (*z*), in the case of a winding up of a company by or subject to the supervision of the Court, every disposition of the property of the company made after the commencement of the winding up (*a*) shall, unless the Court otherwise orders, be void, a purchaser of land from a company should, where there is any reason to suspect the position of the company, search in the *London Gazette* for advertisements of winding-up petitions (*b*).

This exhausts the list of searches, which ought usually to be made; but it will be observed that of these the first three only are unquestionably necessary on every sale; though Nos. 4 and 5 are very desirable and No. 6 is perhaps advisable apart from the special circumstances which make them absolutely requisite. Nos. 7, 8, 9, and 10 need only be undertaken on the purchase of the particular kind of property which can be affected by the registered incumbrances so to be searched for. Search for disentailing assurances or certificates of the acknowledgment of deeds by married women is only necessary in the special circumstances above mentioned (*c*).

(*y*) See stat. 8 Edw. VII. c. 69, ss. 100, 101 (the latter replacing 7 Edw. VII. c. 50, s. 17), under which this register is open to public inspection. This register was established by stat. 25 & 26 Vict. c. 89, s. 43, but was thereby made open to the inspection of creditors and members of the company only. It was held that non-registration in this register did not avoid the charge; *Wright v. Horton*, 12 App. Cas. 371.

(*z*) Stat. 8 Edw. VII. c. 69, s. 205 (2), replacing 25 & 26 Vict. c. 89, s. 153.

(*a*) This is, on a winding up

by the Court, the time of the presentation of the petition for winding up; and on a winding up under the supervision of the Court, the time of the passing of the resolution authorising the winding up; see stat. 8 Edw. VII. c. 69, ss. 139, 183, replacing 25 & 26 Vict. c. 89, ss. 84, 130; *Weston's Case*, L. R. 4 Ch. 20; *Re Dry Docks Corp.*, 39 Ch. D. 306; *Re West Cumberland Iron Co.*, 40 Ch. D. 361.

(*b*) 1 Dart, V. & P. 566, 6th ed.; 1222, 7th ed.

(*c*) Above, p. 596.

It was not the practice, prior to the Land Charges Acts of 1888 (*d*) and 1900 (*e*), to direct any search to be made in respect of any of the charges or matters then necessary to be searched for—viz. judgments, writs of execution, Crown debts and process of execution, annuities, *lis pendens*, and assurances registered in a county register or enrolled in Court Rolls (*f*)—against the names of persons entitled previously to the date of the last purchase deed, as it was assumed that all necessary searches were made on the occasion of the last purchase (*g*). And the same practice prevails with respect to the matters above mentioned (*h*) as to which searches are now required; though in strictness it appears desirable to carry back searches Nos. 1 and 2 in every case for the whole five years before the sale and to extend searches Nos. 8 and 9 over the whole period covered by the abstract. But search should always be made against the names of all persons appearing by the abstract to have been entitled to the land sold since the date of the last purchase deed for any estate or interest which might be adversely affected by any of the incumbrances to be discovered by the search. Thus the search for writs and orders affecting land and *lis pendens* should be made against the names of trustees or mortgagees as well as beneficial owners; for a writ, order, or suit affecting the land sold may well

Against what
names
searches
should be
made.

(*d*) Stat. 51 & 52 Vict. c. 51.

(*e*) Stat. 63 & 64 Vict. c. 26.

(*f*) See Wms. Real Prop. 86, 94, 465—467, 13th ed.; 270—278, 285—287, 293, 294, 602—605, 21st ed.

(*g*) On this point the testimony of Mr. Joshua Williams is express: Wms. Real Prop. 557, 1st ed., 465, 13th ed. And the same rule is laid down in Elphinstone & Clark on Searches, 144, 148, 149. Mr. Dart, however, stated that searches in the Middlesex and Yorkshire Registries and in the Court Rolls should extend

over the whole period covered by the abstract: 1 Dart, V. & P. 497, 5th ed.; 567, 6th ed.; 1223, 7th ed. The statement in 1 Dart, V. & P. 560, 6th ed., that it is not the practice to go further back, in searching, than the last *mortgagee* or purchaser for value does not appear in the 5th ed. (p. 491), and is the statement of the editors only. The same statement as to the practice is, however, made in Wolstenholme's Conveyancing and Settled Land Acts, 196, 8th ed.

(*h*) Above, pp. 597—600.

have been issued, made, or instituted against a trustee or mortgagee, although the judgment or Crown debts of a trustee (*i*) or of a mortgagee, who has been paid off (*k*), cannot affect the trust or mortgaged property. The same search should also be made against the names of persons entitled to a general power of appointment over the land sold or to any vested or contingent remainder or any executory interest therein, if the title depend on any exercise or release of the power or any release or conveyance of the remainder or executory interest. For under the Judgments Act, 1838, and the Land Charges Act, 1900, lands over which a man has a general power of appointment may be taken under the writ of *elegit* in execution of a judgment against him, and the judgment is a charge on the lands when the writ or order for enforcing it has been registered (*l*). Under the same Acts (*l*), too, a judgment is a charge on all lands to which the judgment debtor is entitled for any estate or interest at law or in equity, whether in possession, reversion, remainder, or expectancy, so soon as a writ or order for enforcing the same has been registered (*m*). And, although no freehold estate in reversion or remainder, not being merely expectant on a lease for years (*n*), can be taken in execution under a writ of *elegit* (*o*), it appears that an order for the appointment of a receiver may be made in respect of such an interest, and that such an order, though not equivalent to actual delivery in execution, may nevertheless be an order made for enforcing the judgment, and so may be sufficient, if duly registered, to give rise to the statutory

(*i*) *Finch v. Finchalesea*, 1 P. W. 277, 282; *Whitworth v. Gaugain*, 1 Ph. 728.

(*k*) Stat. 18 & 19 Vict. c. 15, s. 11; *Graves v. Wilson*, 25 Beav. 434; Wms. Real Prop. 569, 21st ed.

(*l*) Stats. 1 & 2 Vict. c. 110, ss. 11, 13; 63 & 64 Vict. c. 26,

s. 2 (1); Wms. Real Prop. 381, 21st ed.

(*m*) See Wms. Real Prop. 419, 21st ed.

(*n*) *Mayor of Poole v. Whitt*, 15 M. & W. 571.

(*o*) *Re South*, L. R. 9 Ch. 369; *Hood-Barrs v. Cathcart* (No. 5), 1895, 2 Ch. 411.

charge (*p*). This point, however, is open to question and has not yet been decided (*q*), but until it be, it is advisable to make the search suggested. Life annuities are generally searched for against the names of beneficial owners only: though a trustee might also create such charges valid at law, where the trust is not disclosed by the title deeds. It is of course unnecessary to search in bankruptcy against the names of trustees who have no beneficial interest, as their estates are not affected thereby (*r*), but mortgagees' estates are divested on their bankruptcy. Land charges registered under the Land Charges Act, 1888 (*s*), are entered, in the case of freeholds, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge, and in the case of copyholds, in the name of the tenant on the Court Rolls at the time of the creation of the charge; and they must be searched for against such names. Land improvement charges created before the year 1889 must be searched for against the name of the landowner at whose instance they were made (*t*); generally the person beneficially entitled in possession to the rents and profits of the land.

It may be observed that there is no obligation on a purchaser to make or direct any search at all; he owes

No obligation on purchaser to search.

(*p*) *Re Harrison and Bottomley*, 1899, 1 Ch. 465, 471.

(*q*) The jurisdiction of the Court to make an order for the appointment of a receiver in respect of a judgment debtor's legal or equitable estates in reversion or remainder in land may be supported by the decision in *Tyrell v. Poulton*, 1895, 1 Q. B. 202, and the dicta of Lindley, M.R., in *Re Harrison and Bottomley*, 1899, 1 Ch. 465, 471, and by the consideration that under the Land Charges Act, 1900, actual delivery in execution is no longer a condition precedent to the attachment of the charge given by sect. 13 of the Judg-

ments Act, 1838; but the principles laid down in *Holmes v. Melville*, 1893, 1 Q. B. 551, seem opposed to any such jurisdiction.

(*r*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 168.

(*s*) Stat. 51 & 52 Vict. c. 51, s. 10, providing also that where the person, on whose application the land charge was created, was beneficially entitled to a lease for lives or life at a rent or to a term of years, the land charge shall also be registered in the name of that person.

(*t*) See the Acts cited above, pp. 588—593; Elphinstone & Clark on Searches, 109 *sq.*

Search is
notice.

Duty of
purchaser's
solicitor to
search.

no duty in this respect to any person interested under an entry in any register, and omission to search is not negligence which will affect him with notice of any matter to be discovered by searching (*u*). But if he do make a search in person or by agent, he will be affected with notice of all entries in the register which affect the land sold, although he may fail to discover them (*x*).

It is the duty of the purchaser's solicitor to make on his behalf all searches which in the circumstances of the case are necessary and proper (*y*); and if he omit so to search and the purchaser's title be injuriously affected in consequence, he will be liable to his client in an action of negligence for the damage incurred (*z*).

Official
searches.

Under the Conveyancing Act, 1882 (*a*), and the Land Charges Act of 1888 (*b*), official searches may be directed to be made in the registers of *his pendens*, life annuities, writs and orders affecting land, land charges, deeds of arrangement, and certificates of acknowledgment by married women, and a certificate of the result of the search filed. Such a certificate, according to the tenour thereof, is conclusive, affirmatively or negatively, as the case may be, in favour of a purchaser as against persons interested under the matters or documents, which are the subject of registration; an office copy is evidence of the certificate; and solicitors obtaining an office copy of such a certificate, and any trustees, execu-

(*u*) *Lane v. Jackson*, 20 Beav. 535.

(*x*) *Procter v. Cooper*, 2 Drew. 1, 18 Jur. 444; affirmed, 1 Jur. N. S. 149. Having regard to the provisions of stat. 45 & 46 Vict. c. 39, s. 2 (3), stated below, as to the certificate of the result of an official search being conclusive, negatively, it seems that a purchaser will not, by merely directing an official search to be made, be affected with notice of

any entries not appearing in the certificate.

(*y*) See above, pp. 597—600.

(*z*) *Cooper v. Stephenson*, 16 Jur. 424, 21 L. J. Q. B. 292; Sug. V. & P. 547; Elphinstone & Clark on Searches, 4, 5; Dart, V. & P. 454, 455, 5th ed.; 522, 523, 6th ed.; 1196, 1197, 7th ed.

(*a*) Stat. 45 & 46 Vict. c. 39, s. 2.

(*b*) Stat. 51 & 52 Vict. c. 51, s. 17.

tors, agents or other persons in a fiduciary position for whom they are so acting, are not answerable in respect of any loss that may arise from any error in the certificate (*c*). These advantages are not obtainable on private searches, which may still be made. The utility of official searches has, however, been doubted by the learned authors of the treatise on searches (*d*), who maintain that the certificate of the result of an official search can only be evidence, negatively, that no entry of any of the matters searched for is made against the name of the person therein mentioned by the description applied to him in the requisition for search, and does not exclude the possibility of the existence of other entries against that person by the same name but under a different address or description. It appears, however, that this contention is not quite correct. The Conveyancing Act, 1882, provides that the certificate shall be conclusive according to *its* tenour (*e*), not according to the tenour of the requisition for search. It is true that by the rules made under that Act (*f*) any one directing an official search to be made against a particular name is required to state the usual or last known place of abode as well as the title, trade or profession of the person bearing that name. But according to the forms prescribed by these rules, the search is directed to be made against the *name* mentioned in the requisition, and the certificate is of the result of a search against the name specified in the certificate. By the practice of the office, too, the certificate of the result of the search does not necessarily specify the address and description of the person against whose name the search was made. If no entry, or none but those specified in the certificate, were found against any person of that *name*, the fact is

c See the two previous notes.

d Elphinstone & Clark on Searches, 166-168.

e Above, p. 604.

f See Wms. Conv. Stat. 479 *sq.*; Wolstenholme's Conveyancing and Settled Land Acts, 159 *sq.*, 8th ed.

so stated in the certificate, without adding the address and description contained in the requisition for search; and in such case the certificate certainly has a value unobtainable by a private search. If entries are found against the same name but coupled with a different address and description, the certificate then states that no entries, or none but the entries specified therein, have been found against the name, address and description contained in the requisition for search. This form of certificate shows that there are entries against the same name but coupled with an entirely different address and description, and is a warning that further search may be necessary. If, however, entries are found against the name specified in the requisition for search, but coupled with an address and description which, though not identical with those contained in the requisition, render it probable that the person so described is the same as that mentioned in the requisition, then a note is made in the schedule to the certificate, of the entries against the person so described. And if the identity of the person be certain, as it would be in the case of a peer, though the address be different, all the entries against the name are included in the schedule to the certificate (*g*). It appears, therefore, that a certificate of the result of an official search has a greater value than is allowed by the learned authors of the treatise on searches; and it seems that in general the best course to take is to direct an official, instead of making a private search. When this course is adopted, the purchaser obtains in the certificate a valuable document of title, and the purchaser's solicitor is relieved from the liability which he would incur if he or one of his clerks searched the register but failed to discover a material entry.

(*g*) The writer is indebted for this information to the courtesy of the officials in the Land

Charges Department of the Office of Land Registry.

Official searches may also be directed to be made in the index of enrolled disentailing deeds (*h*), in the Yorkshire Registries (*i*), and in the index of assurances registered in the Middlesex Registry (*k*). The certificate of the result of any such search has no effect as against any person interested under any entry duly made, but not disclosed by the certificate (*l*); but in the case of the Middlesex (*k*) and Yorkshire (*i*) Registries, solicitors directing an official search, and any persons in a fiduciary position for whom they are acting, are protected against liability for any loss that may arise in consequence of an error in the certificate. It appears, therefore, that in these cases also, the best course for the purchaser's solicitor to take is to direct an official search. It may be remarked that an official search must necessarily be made by a person familiar with the register or index of which he is in charge, and experienced in searching for entries therein; but a solicitor may not always be able to entrust a private search to a clerk experienced in such matters.

Official searches for disentailing deeds and in the Yorkshire and Middlesex Registries.

Besides making the above-mentioned searches (*m*), the purchaser should, where the property sold is likely to be subject to any statutory charge of the kind held *not* to be a land charge within the meaning of the Land Charges Act of 1888 (*n*), such as a charge for a proportion of the expenses incurred by a local authority in sewerage, paving or lighting an adjoining street, inquire of the vendor whether the property is or will become subject to any such charge, and also if he has notice or knowledge of any fact (such as a demand made, notice

Inquiries to be made before completion.

(*h*) R. S. C. 1883, Order 61, r. 23.

(*i*) Stat. 47 & 48 Vict. c. 54, ss. 20-23, 31.

(*k*) Land Registry (Middlesex Deeds) Rules, 1892, Nos. 2-14.

W. N. 13th Feb. 1892.

(*l*) See stat. 45 & 46 Vict. c. 39, s. 2 (1, 11); Wms. Conv. Stat. 273, 274.

m Above, pp. 597-600.

(*n*) Above, pp. 177, 521, 592, 593.

served, or resolution passed by the local authority requiring the execution of any street or other works) which will subject the property sold to a charge of this kind at any future time. This inquiry is usually appended to the requisitions on title (*o*): but as such a liability may arise after they have been delivered, and should be discharged by the vendor as an outgoing if incurred before the time fixed for completion (*p*), it is prudent, where there is a likelihood or possibility of any such liability, to repeat this inquiry just before completion, and also to make inquiry of others, as of neighbours or of the local authority (*q*). As we have seen (*r*), a purchaser may be able to insist on such a liability being discharged as a condition precedent to completion in cases where he might have some difficulty in recovering the amount thereof from the vendor if paid by himself after completion. And generally the purchaser should ascertain, before he completes the purchase, that all outgoing payments payable by the vendor, whether for rates, taxes, rent or any other matters that might subject the purchaser to any liability for their payment (*s*), have

As to discharge of outgoing payments payable by the vendor.

(*o*) Above, p. 177.

(*p*) Above, pp. 520—523.

(*q*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625, where a purchaser, who completed his contract without making such inquiries, was held not to be entitled to compensation, under a condition providing that compensation should be allowed for any omission in the particulars, by reason of the vendor having omitted, without fraudulent intent, to disclose that such a notice as above mentioned had been served on him before the date of the contract for sale, no liability under such notice having been actually incurred before completion. It was pointed out, however, by Rigby, L. J. (p. 632), that, if the purchaser had not completed the contract, he might perhaps have relied upon such

omission as a ground for resisting the specific performance or claiming the rescission of the contract; cf. *Carlisch v. Salt*, 1906, 1 Ch. 335, 340; but see the writer's criticism of the *dicta* in this case in 50 Sol. J. 611; and as to non-disclosure, see below, Chap. XIII. § 1, XIV. § 1. See also *Hampstead Corp'n. v. Cawnt*, 1903, 2 K. B. 1, as to the liabilities of the above nature which a purchaser may incur. It has been laid down that in cases of the above kind there is no incumbrance nor even a liability, inchoate or otherwise, on the property, until the charge given by the statute has arisen; *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226, 230, 231; see above, p. 522, and n. (*i*).

(*r*) Above, p. 522.

(*s*) Above, p. 521.

been duly discharged. If the property sold include a house having water, gas or electric light laid on, the purchaser should ascertain that the water rate or other charges payable by the vendor have been duly paid or that non-payment thereof will not subject him to any liability (*t*).

The purchaser must further ascertain that the possession or enjoyment of the land sold is in accordance with the title shown. For this purpose he should make inquiries of all tenants or occupiers of the property sold or any part thereof as to the nature and extent of their interest therein. For if he have notice of a tenancy of any part of the property, he will be affected with notice of all rights or equities of the tenant against the vendor with regard not only to the lease (*u*), but also to all collateral matters (*x*); as, for instance, if the tenant should have an agreement or option to purchase the demised premises (*y*), or the timber growing thereon (*z*), or if the property sold belonged in equity to a partnership firm, of which the vendor was a member (*a*), and were in the occupation of the firm (*b*). So actual knowledge that the rents are paid to some person, whose title is inconsistent with the vendor's, is constructive notice of that person's rights: but mere knowledge that the rents are paid to an estate agent does not affect the purchaser with any notice or put him upon inquiry (*c*). As we have

Ascertaining that possession is in accordance with the title.

Inquiry of tenants and occupiers as to their interest.

(*t*) See *Sheffield Waterworks Co. v. Wilkinson*, 4 C. P. D. 410, 422, 424; *East London Waterworks Co. v. Kellerman*, 1892, 2 Q. B. 72; *Canon Brewery Co. v. Gas Light and Coke Co.*, 1904, A. C. 331.

(*u*) See *Caballero v. Henty*, L. R. 9 Ch. 447, 449.

(*x*) *Barnhart v. Greenshields*, 9 Moore, P. C. 18, 32; *Hunt v.*

Luck, 1901, 1 Ch. 45, 49, 1902, 1 Ch. 428, 432.

(*y*) *Daniels v. Davidson*, 16 Ves. 249, 17 Ves. 433.

(*z*) *Allen v. Anthony*, 1 Mer. 282.

(*a*) See above, p. 465.

(*b*) *Cavander v. Bulleel*, L. R. 9 Ch. 79.

(*c*) *Hunt v. Luck*, 1901, 1 Ch. 45, 1902, 1 Ch. 428.

Inspection
and survey of
the property.

seen (*d*), where the property sold is a reversion expectant on a leasehold interest yielding rent, the purchaser should ascertain that the tenant is paying his rent to the vendor. And where land is sold with vacant possession to be given on completion of the purchase, the purchaser should ascertain that the vendor himself, or some person who makes no claim adverse to the vendor's title and will undertake to give up possession according to the contract of sale, is in occupation thereof (*e*). As has been already mentioned (*f*), it is possible that a person may be in possession of the property sold by virtue of a writ of *elegit* actually executed but not registered, or that a tenant may be paying his rent to a receiver appointed under an unregistered order made by way of equitable execution; and in such cases the purchaser may be bound by the writ or order if he have notice of it. The purchaser should also carefully inspect the whole of the property sold and have it surveyed prior to completion, and should make inquiry of the tenants or occupiers with respect to the boundaries or other matters regarding the physical condition of the property. For if by reason of any material defect of quantity or otherwise the property sold do not correspond with the description of it given in the contract, or in any representation which induced the purchaser to make the contract, and the error be caused by the innocent misrepresentation of the vendor and not by fraud, the purchaser will be entitled to resist the specific performance of or to rescind the contract, while it remains uncompleted (*g*): but when the contract has been fully performed, the purchaser will not be entitled

(*d*) Above, pp. 399, 400.

(*e*) As to the duty of the vendor to give up vacant possession on completion, see above, pp. 512, 515, 578; *Engell v. Fitch*, L. R. 4 Q. B. 659; *Royal Bristol, &c.*

Society v. Bomash, 35 Ch. D. 390.

(*f*) Above, p. 584.

(*g*) Above, p. 608, and n. (*q*); *Jacobs v. Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

to any relief in respect thereof (*h*), except (1) by virtue of an express agreement contained in the contract to make compensation for such errors (*i*), or (2) if the defect be really a defect of title and compensation be recoverable under the covenants for title contained in the conveyance (*k*), or (3) if the representation amounted to a warranty, collateral to the contract for sale, of the truth of the fact stated (*l*). Here it may be mentioned that if a man buy land without inspecting it, he does so at his own risk and must accept without compensation any defects in the physical condition of the property which are patent to any one who views it and are not inconsistent with the description contained in the contract for sale; as where a meadow sold is obviously crossed by a public footpath (*m*), or a house sold is plainly out of repair (*n*). But a man may decline to perform the contract on account of defects which are latent, or not discoverable by inspection, if they interfere materially with the enjoyment promised to him by the contract; as where a pathway across a field adjoining a private dwelling-house is subject to an easement of way, not disclosed by the contract, in favour of an adjoining landowner (*o*); and this is the case whether the purchaser actually inspect the property sold or not, and notwithstanding that the contract provide that, the property being open to inspection, the purchaser shall be deemed to buy with full knowledge

Purchaser buying without inspection must accept patent, but not latent defects.

(*h*) *Wilde v. Gibson*, 1 H. L. C. 605, 632, 633; *Judith v. Baker*, 11 Q. B. D. 255; *Clayton v. Leach*, 41 Ch. D. 103; *Siddons v. North Eastern Salt Co.*, 1905, 1 Ch. 326; above, pp. 66, 608, n. (*g*); below, Chap. XIV. § 1.

(*i*) *Palmer v. Johnson*, 13 Q. B. D. 351; above, pp. 65, 66; see *Debenham v. Southbridge*, 1901, 2 Ch. 98; below, § 4 of this Chapter.

(*k*) *May v. Platt*, 1900, 1 Ch. 616; and see *Jochenheim v. Saw-*

bridge, ubi sup.; below, Chap. XIX. § 5.

(*l*) *De Lussall v. Guildford*, 1901, 2 K. B. 215.

(*m*) *Bowles v. Rowall*, 5 Ves. 508.

(*n*) *Grant v. Munt*, G. Coop. 173, 177; *Keates v. Cadogan*, 10 Q. B. 591; *Cook v. Waugh*, 2 Giff. 201.

(*o*) *Ashburner v. Sewell*, 1891, 3 Ch. 405; see above, pp. 73, n. (*l*), 175, 176, 608, and n. (*g*).

of the actual quantities and condition thereof (*p*). Such a stipulation may, however, in some cases prevent the purchaser from raising objections to defects discoverable by a careful survey, though not by a mere casual view of the property (*q*). As we have seen (*r*), if a man buy land with notice that a good title cannot or will not be made in some particular, he is precluded from objecting in this respect to the title shown, unless the vendor have by the contract of sale expressly agreed to make a good title. This doctrine may prevent a purchaser buying land with notice of physical defects, which would otherwise constitute a ground for refusing to perform the contract, from objecting to the title on that account; and may also preclude him from avoiding the contract, where the vendor has made an innocent misrepresentation as to the property sold, but the purchaser bought with notice of the true state of the facts (*s*).

§ 3.—*Of the Preparation of the Conveyance.*

Preparation
of the con-
veyance.

As we have seen (*t*), it is the purchaser's duty at his own expense to prepare a proper instrument of conveyance to himself of the property sold and to tender the same to the vendor for his execution; the vendor is bound to execute this instrument at his own expense; and where other persons than himself are necessary parties thereto, in order to convey to the purchaser the whole estate contracted for, he is bound, in the absence of stipulation to the contrary, to procure them to execute the same at his own expense. What persons are necessary parties to the conveyance will have been ascertained

Who are
necessary
parties to the
conveyance.

(*p*) *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*q*) *Re Terry and White's Contract*, 32 Ch. D. 14, 23.

(*r*) Above, pp. 203, 353, 354.

(*s*) See *Farebrother v. Gibson*,

1 De G. & J. 602; *Leyland v. Mlingworth*, 2 De G. F. & J. 248; below, Chap. XIV. § 1.

(*t*) Above, pp. 35, 46, 47, 67, 73, n. (*u*), 578.

on the investigation of title. Every person in whom is vested any portion of the legal and equitable estate contracted for in the land sold, or any interest therein, must concur in the conveyance to the purchaser, unless his interest be such that it will be conveyed or defeated by the execution of some paramount trust or power intended to be exercised by the instrument of conveyance. Thus, where an unincumbered estate in fee simple is sold, all persons entitled for a vested estate either for life, in tail, or in fee, and either in possession or in remainder, to the whole or any fraction of the freehold in fee, all persons entitled to any contingent or executory interest which will or may displace or defeat any present vested estate, all mortgagees, portioners, jointresses and doweresses, all persons entitled to any term of years, continuing tenancy, rent-charge, *profit à prendre* or easement, and all persons interested in the property sold under any trust or equity of or by which the purchaser has notice or is bound (*u*), are necessary parties to the conveyance (*x*); unless the assurance to the purchaser is to be effected, for example, by the exercise of a power of appointment operating under the Statute of Uses or created by will, of a statutory power, such as that given by the Settled Land Act, 1882 (*y*), or of a trust for or power of sale on the part of trustees having the legal estate (*z*). And where the conveyance is to be carried out by virtue of an authority paramount to the estate or interest of some person entitled, who is not, therefore, to be made a party thereto, care must be taken that all persons, whose estates or interests are not bound by the execution of the authority, shall concur to convey the same. Thus we have seen that on a sale under the powers given by the Settled Land Acts, there may be

u Above, pp. 169, 237 *sq.*

(*x*) See Wms. Real Prop. 452, 453 and elsewhere, 13th ed.:

594, 595 and elsewhere, 21st ed.

(*y*) Above, p. 306.

(*z*) Above, p. 256.

Intermediate
trustees.

various estates and interests, which will not be displaced or defeated by the conveyance of the tenant for life (*a*); and the owners of all such estates and interests, as paramount mortgagees of the fee, mortgagees for securing money actually raised under some power or trust for the purpose contained in the settlement or assignees for value of the estate of the tenant for life (unless these last by some separate document consent to the exercise of the tenant for life's power (*b*)), must be required to assure by their own conveyance their estates or interests to the purchaser. So also, where the purchaser has bought at a sale made by order of a Court of Equity, he need not require the concurrence in the conveyance of any persons having *equitable* estates or interests, which are bound by the order for sale: but he must obtain a conveyance of the interests of all persons entitled to the *legal* estate in the property, or to any equitable estate or interest therein *not* bound by the order (*c*). Where the title to any land sold is such that intermediate trustees are interposed between trustees seised or possessed of the legal estate and the persons beneficially entitled, as where land has been assured to the use of A. in fee on trust for B., who is a trustee for C., the intermediate trustees are not necessary parties to the conveyance of the land, which may well be made by the trustees holding the legal estate and the persons beneficially entitled (*d*). The intermediate trustees, however, may possibly have acquired a lien on the land for their costs or expenses, so that their concurrence may, it seems, be required by a purchaser in order to release or acknowledge the non-existence of any such lien (*e*). And if it be proposed in

(*a*) Above, pp. 307, 317 *sq.*

(*b*) See above, pp. 318, 319, 321—325.

(*c*) Above, pp. 471, 472.

(*d*) See *Head v. Teynham*, 1

Cox, 57; — v. *Walford*, 4 Russ. 372; *Grange v. Witherfore*, 5 Times L. R. 436.

(*e*) See above, p. 366, and n. (*x*).

such cases to dispense with their concurrence, inquiry should be made of them if they claim any such lien.

Here we may notice that if any necessary party to the conveyance be under any incapacity, such as that of infancy, coverture on the part of a woman, or lunacy, all due steps must be taken to secure the proper assurance of his or her estate to the purchaser, either by vesting order (*f*), concurrence of the husband and acknowledgment of the deed in the case of a married woman not entitled to the land as her separate property, or otherwise.

Incapacity of any party to the conveyance.

On the side of the grantee or grantees under the conveyance, the purchaser himself is in general the only necessary party. But as we have seen (*g*), the vendor's obligation is to execute a conveyance of the land sold to the purchaser, or as he shall direct. The purchaser is therefore entitled to require the conveyance to be made to some other person or persons than himself, or to himself and others, and for such estates and interests as he shall direct; and the vendor is bound to assure the lands sold accordingly. It appears that in such case the vendor may in general demand that the purchaser, with whom alone he has contracted, shall be made a party to the conveyance in order to testify that he has directed the conveyance to be made to a stranger to the contract and that the vendor has duly performed his part of the contract by complying with this direction (*h*). But if the purchaser should have made an absolute assignment of all his interest in the contract, and the assignee have given notice of the assignment

Parties to the conveyance on the grantee's side.

Conveyance to the purchaser's nominee.

(*f*) Above, pp. 536, 561.

(*g*) Above, p. 46.

(*h*) This appears to follow from the fact that, if the purchaser's assignee seek to enforce the specific performance of the con-

tract by the vendor, the purchaser should be made a party to the action (above, p. 568), and would be a proper party to a conveyance ordered in such action.

and be willing to take upon himself the whole burden of the original contract and prove his title by assignment from the purchaser, then it seems that the vendor ought to complete the contract with the assignee alone, without requiring any further concurrence of the purchaser (*i*). In this event, however, it is thought that the assignee could not insist on the vendor executing a conveyance which took no notice of the original contract and the assignment; for the vendor would be entitled to have the payment and receipt of the original price mentioned, and could not be made to accept any recital or statement alleging, contrary to the truth, that he had contracted with the assignee for the sale of the land (*k*). If the purchaser before completion re-sell the land to another, it is to the sub-purchaser's interest to obtain a conveyance direct from the vendor and taking no notice of the original contract, as this will prevent the raising in the future of any question whether the original purchaser incumbered his interest before the re-sale and the sub-purchaser had notice thereof (*l*). Where there is no

(*i*) Above, pp. 568—570.

(*k*) *Hartley v. Burton*, L. R. 3 Ch. 365.

(*l*) It is thought that, where a purchaser re-selling before completion discloses to the sub-purchaser the fact that he is himself a purchaser under an uncompleted contract of sale and in effect sells the interest so acquired by him, the sub-purchaser cannot oblige him to take a conveyance from the original vendor; as that course would apparently involve the payment by the first purchaser of *ad valorem* stamp duty on such conveyance. But if the first purchaser so re-sell as if he were the full owner of the land, without disclosing that he is only entitled under an uncompleted contract of sale, it is submitted that the sub-purchaser's strict right would be to require the first purchaser to take a convey-

ance of the legal estate from the vendor in order to avoid all question of the first purchaser having incumbered his equitable interest under the contract for sale; see below, p. 619, and n. (*a*). Having regard to this liability, it is advisable for a purchaser of land re-selling before completion to sell his interest under the contract for sale, as such, and to stipulate expressly that the sub-contract shall be completed by a conveyance from the original vendor to the sub-purchaser by the first purchaser's direction. Where a purchaser of land re-sells before completion, he is bound to furnish, at the sub-purchaser's request, an abstract of the original contract for sale and of his dealings, if any, with his interest thereunder; *Re Huckerby and Atkinson's Contract*, 102 L. T. 214, where note that

increase of price on the re-sale, the vendor may well agree to this if the original purchaser sign a memorandum authorising him to convey the land direct to and to receive payment of the price from the sub-purchaser (*m*). But if the purchaser re-sell at an increased price, he must be a party to the conveyance in order to acknowledge the receipt of his profit on the transaction (*n*); for the sub-purchaser is only entitled to a conveyance on payment of the price fixed by the re-sale to the person entitled to receive it (*o*), and cannot of course require the vendor to accept the whole of this and pay over part of it to the original purchaser. And the price fixed by the re-sale must be stated in the conveyance, as it is on that price that the stamp duty is payable (*p*). Where the vendor will remain after the conveyance under some liability in connexion with the property sold, as where leasehold land subject to payment of a rent and performance of onerous covenants is sold, and the purchaser is therefore bound to enter into a covenant of indemnity (*q*), it is thought that the vendor is not obliged to accept the liability of the purchaser's assignee as a substitute, but may insist on having the covenant of the person, with whom alone he himself has contracted (*r*).

Subject to the question discussed below (*s*), whether Form of the outstanding estates or incumbrances should be got in by conveyance. deeds separate from the conveyance, the conveyance of

the sub-purchaser expressly waived all objection to accepting a conveyance direct from the original vendor (see p. 215).

(*m*) See 1 Dart, V. & P. 511, 5th ed.; 581, 6th ed.; 536, 7th ed. The memorandum should be in duplicate, one part being given to the sub-purchaser.

(*n*) See Davidson, Prec. Conv. vol. ii. pt. i. 319, 4th ed.

(*o*) Above, p. 578.

(*p*) Stat. 54 & 55 Vict. c. 39, s. 58 (4), (5).

(*q*) See above, p. 80; and see below in the present section of this chapter as to the cases in which the purchaser is bound to give a covenant of indemnity.

(*r*) This appears clearly to follow from the rule that the burthen of a contract cannot be assigned over; above, p. 570.

(*s*) Page 619.

the property sold will, as a rule, be effected by one deed. But it is for the purchaser to decide in what form he will take his conveyance, provided that the burden laid on the vendor, in respect of expense and otherwise, be not materially increased by the purchaser's choice (*t*). Thus, where properties of different kinds or held under different titles are sold by one contract, the purchaser may require the same to be conveyed by separate assurances and apportion the purchase money as he may think fit (*u*). For example, where freeholds and copyholds are sold together, the conveyance cannot of course be effected by one deed, the copyholds requiring to be assured by surrender and admittance. So where freeholds and leaseholds are included in one contract of sale, the purchaser may require that his title to the freeholds shall not be incumbered with the assignment of the leaseholds, and as to the leaseholds themselves, that his title under one lease shall not be complicated with the assurance of land held under another. And where lands sold together lie far apart, as in different counties not adjoining each other, he may demand that they shall be assured by separate deeds. But it is questionable whether the vendor can be compelled, in the absence of special stipulation, to execute a great number of separate conveyances in different parcels of a lot of land lying near together and sold by one contract; for that would sensibly increase the vendor's trouble of perusing and executing the assurance completing the contract; and in any case he could only be required to do so on the terms of being paid the extra expense so occasioned, and also, it is thought, on condition that he were not asked to assure lands accurately described as one entire property in the contract by several new descrip-

(*t*) See *Clark v. May*, 16 Beav. 679, 685; *Egmont v. Smith*, 6 Ch. D. 469, 474.

(*u*) *Clark v. May*, 16 Beav. 273.

tions of the particular parts thereof (*x*). If a purchaser desire to take a conveyance in lots of lands offered to him for purchase by private contract as one entire estate, he should certainly insert an express stipulation to that effect in the contract (*y*).

Where the whole estate in the land sold is not vested in the vendor, as where it is subject to mortgages or other charges or incumbrances, which have to be paid off, discharged, or released, to enable the vendor to convey such an estate as he contracted to sell (*z*), it appears that, if by the contract the vendor purported to sell the whole estate as vested in himself without disclosing the state of the title, and in the absence of any stipulation to the contrary, the purchaser is in strict right entitled to require the vendor at his own expense to get in all the outstanding estates and interests and vest them in himself or in a trustee for himself, in order that the conveyance to the purchaser may be one simple deed of assurance from the vendor, or from him and his trustee, to the purchaser (*a*). But it has never

Sale of lands
subject to in-
cumbrances.

x See Sug. V. & P. 559 : 1 Dart, V. & P. 503, 5th ed. : 573, 6th ed. : 531, 7th ed. It is submitted that the *dictum* of Jessel, M. R., in *Egmont v. Smith*, 6 Ch. D. 469, 474, that in no case can a vendor object to convey the sold property in parcels on receiving the whole purchase money, and on being paid the additional expense, is not correct. The vendor's obligation is to convey the land which he has contracted to sell. What that land is, is shown by the description thereof contained in the contract for sale. If the vendor has shown a good title, that is, has proved his right to convey what he contracted to sell, including the identity of the land described in the contract with that described in the title deeds, and

with that of which possession is offered (above, pp. 43, 94), it appears that the vendor cannot be obliged to convey and to covenant for title by other descriptions than those under which he sold. But lands sold as one entire property can seldom be conveyed in lots without a number of new descriptions. This consideration alone, it is submitted, exhibits the inaccuracy of the late M. R.'s *dictum*. Besides, it takes no account of the increased trouble, apart from the extra expense, which may be laid on the vendor.

(*y*) Note that such a stipulation was actually made, in the case of *Egmont v. Smith*, *ubi sup*.

(*z*) Above, pp. 94, 164.

a Sug. V. & P. 557 : Dart, V. & P. 722, 5th ed. : 814, 6th ed. : 723, 7th ed. : see *Reeves v.*

been the practice to insist on this right, except in circumstances of extreme complication (*b*); and, as we shall see, it is not to the purchaser's interest to allow the legal estate to be conveyed to the vendor, where the land sold is heavily incumbered; so in most cases the conveyance is taken by one deed, to which the incumbancers, as well as the vendor, are parties. If, however, by reason of the number of estates or interests outstanding in persons, who were not parties to the contract of sale, the expense of preparing the instrument of conveyance is sensibly increased, the purchaser is entitled to require the vendor to bear the extra expense so occasioned (*c*): though where the contract shows that the property is subject to charges or incumbrances, which must be released in order to make a good title, it does not appear that the vendor is liable to contribute to the cost of preparing the conveyance (*d*). As we have seen (*e*), it is and has long been the practice to stipulate expressly in conditions of sale by auction that the vendor and all other necessary parties, if any, shall execute a proper assurance of the property to the purchaser; and that the purchaser shall bear the expense of preparing, making and doing, not only this assurance, but also every other assurance and act, if any, which shall be required by the purchaser for getting in, surrendering or releasing any outstanding estate, right, title or interest, or for completing or perfecting the vendor's title, or for any other purpose. It has been decided that, where the purchaser expressly undertakes, in words as wide as these, to bear the expense of preparing, *making and doing* every assurance *and act* necessary to get in any outstanding estate or

The usual stipulation as to the costs of conveyance.

Gill, 1 Beav. 375, and the comments thereon in *Sug. V. & P.* 558.

(*b*) *Sug. V. & P.* 557; and see *Jones v. Lewis*, 1 De G. & S. 245.

(*c*) *Sug. V. & P.* 558; 2 Dart,

V. & P. 722, 5th ed.; 814, 6th ed.; 723, 7th ed.; see *Jones v. Lewis*, 1 De G. & S. 245.

(*d*) *Sug. V. & P.* 558.

(*e*) Above, pp. 67, 73.

perfect the vendor's title, he is bound to pay the whole expense of the concurrence in the conveyance to him of the vendor's mortgagees (*f*), or of the execution of a deed of confirmation rendered necessary because of the imperfect execution of the conveyance to the vendor himself (*g*). But the understanding of the profession is that a condition of sale in the above form is not intended to throw upon the purchaser the expense of the perusal on behalf of and execution by the vendor himself of the conveyance of the property sold (*h*)—an expense for which the vendor is liable in absence of express stipulation to the contrary (*i*)—and the practice is for the vendor to bear this expense himself, although the contract contain this condition. It has been held that the stipulation in question does not cast upon the purchaser the expense of deducing the title to any outstanding estate (*k*).

Under the Conveyancing Act of 1881 (*l*), upon the sale, either by the Court (*m*) or out of Court (*n*), of land subject to any incumbrance (including any mortgage, lien or charge of a portion or annuity or other capital or annual sum, whether immediately payable or not), the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court of a sum of money sufficient to provide for the amount

Discharge of incumbrances on sale by payment into Court.

(*f*) *Re Willett and Argenti*, 60 L. T. 735, explained and distinguished in *Re Sander and Walford's Contract*, 83 L. T. 316; 1900, W. N. 183. *Re Willett and Argenti* appears to have given to the usual condition of sale a greater effect than it was previously supposed to have: see Davidson, *Proc. Conv.* vol. i. p. 612, 4th ed.

(*g*) *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 437, affirmed, 1898, 2 Ch. 211.

(*h*) It should be noted, however, that, according to this form,

the purchaser does literally undertake to bear the expense of making the assurance to himself.

(*i*) Sug. V. & P. 561; 2 Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 711, 7th ed.

(*j*) *Re Adams' Trustees and Frost's Contract*, 1907, 1 Ch. 695, 703; above, p. 73, n. (*u*).

(*l*) Stat. 44 & 45 Vict. c. 41, s. 5; see s. 2 (viii.).

(*m*) See *Patching v. Bull*, 30 W. R. 241; *Dickin v. Dickin*, ib. 887.

(*n*) See *Milford, &c. Co. v. Mowatt*, 28 Ch. D. 402.

charged on the land and future costs, expenses and interest (o) ; and the Court may, if it thinks fit, and either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale. This enables a vendor to procure land, which is subject to mortgages or charges, to be conveyed to the purchaser for an unincumbered estate without the concurrence of the incumbrancers. But it appears that the Court will not oblige the vendor, at the purchaser's instance, to adopt this mode of conveying an unincumbered estate, where such a course would involve hardship, as where the amount required to be paid into Court would greatly exceed the purchase money (p).

Vendor should never be allowed to obtain the legal estate.

It should be noted, in connexion with the release of incumbrances, that, where the legal estate is outstanding in mortgagees or trustees, the purchaser should never require or allow the vendor to take a reconveyance or conveyance thereof to himself before completing the purchase (q). The reason of this is that, if the vendor should, while he was entitled to the equity of redemption or other equitable estate in the lands, have executed a conveyance by way of mortgage or otherwise and containing a precise recital, if the lands were thereby assured for an estate in fee simple in possession, that he was seised of them in fee, or in other cases that he was entitled to the legal estate therein, then he and all persons claiming under him would be estopped from denying that he was so seised, or entitled. It would follow that upon the reconveyance or conveyance of

(o) For the purpose of deciding what sum ought to be so paid into Court, the Court will make a declaration as to future rights: *Re Freme's Contract*, 1895, 2 Ch. 256, 778, 780.

(p) *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788.

(q) See *General Finance, &c. Co. v. Liberator, &c. Socy.*, 10 Ch. D. 15, 20.

the legal estate to the vendor, the same would in effect pass at once to the persons entitled under the mesne conveyance. As against those persons, the purchaser, claiming by a subsequent conveyance from the vendor, would be subject to the same estoppel, and would be precluded from alleging that the mesne conveyance passed an equitable estate only, and that he himself held the legal estate as a purchaser for value without notice of the mesne conveyance (*r*). The purchaser would thus be affected by mesne incumbrances created by the vendor, which he might have avoided if he had not allowed the vendor to obtain the legal estate. The right course, therefore, for the purchaser to take is to require that any legal estate outstanding in mortgagees or trustees shall be conveyed by them to him, or to a trustee for him, direct. He will then be able to rely on the doctrines of purchase of the legal estate for value and without notice and of tacking, if the vendor should have created intermediate equitable incumbrances, of which the purchaser knew nothing (*s*). It is thought that, as the vendor is in equity a trustee for the purchaser of the land sold from the date of the contract for sale (*t*), and as the purchaser is entitled to restrain any disposition of the legal estate about to be made to his prejudice by the vendor pending completion (*u*), and

(*r*) An ambiguous recital not precisely averring (in the case of freeholds) the vendor's legal seisin would not have the same effect; for instance, a recital that he was seised of or otherwise well entitled to the lands, for he might well be entitled in equity though not at law. Neither would any such estoppel result from a mere conveyance of lands, without any recitals, by lease and release or grant; for these are innocent conveyances, passing only the assessor's actual estate or interest, if any. Nor would any such estoppel arise from the

fact of the vendor having entered into express or the statutory covenants for title. See *Bensley v. Bordon*, 2 S. & S. 519, 8 L. J. Ch. 85; *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278; *Doe d. Grosford v. Stow*, 3 C. B. 176; *Heath v. Crabback*, L. R. 10 Ch. 22; *General Finance, &c. Co. v. Liberator, &c. Socy.*, 10 Ch. D. 15; *Unward, &c. Socy. v. Smithson*, 1893, 1 Ch. 1.

(*s*) Above, pp. 180, 485, 563—567.

(*t*) Above, pp. 504 *sq.*, 512.

(*u*) Above, p. 518.

is entitled to take his conveyance in what form he pleases and to keep alive any mortgage for his own benefit, if he desire to do so (*x*), the purchaser is entitled to insist that any outstanding legal estate shall be conveyed direct to himself, or to a trustee for him, and shall not, pending completion, be got in by and assured to the vendor. But compliance with such a requirement can only be ensured where the mortgage is to be paid off out of the purchase money. If the vendor propose to pay off the mortgage out of his own resources before completion and take a reconveyance to himself, it does not appear that the purchaser can prevent him from doing so; for if the purchaser were to bring an action for specific performance of the contract, he would be obliged to accept the title so offered, if in other respects good according to the contract (*y*).

Purchase followed by an immediate mortgage.

It constantly happens that a purchaser completes the sale with the assistance of some other person, who advances part of the purchase money and takes a mortgage of the lands sold to secure the repayment of his loan. In such cases it is a common practice for the whole estate in the lands purchased to be conveyed to the purchaser, and to be mortgaged by him to the lender by a deed executed immediately after the execution of the conveyance, the conveyance and the other title deeds being transferred directly from the vendor's into the new mortgagee's custody. It was pronounced by a late learned judge (*z*), that if in a case like this the property sold were in mortgage at the time of the sale, the new mortgagee should never allow the legal estate to get into the purchaser's hands. There is no doubt that it is always preferable for an intending

(*x*) *Cooper v. Cartwright*, Joh. 679, 685.

(*y*) See above, p. 88; below, Chap. XIX. § 3.

(*z*) Jessel, M. R., *General Finance, &c. Co. v. Liberator, &c. Socy.*, 10 Ch. D. 15, 20.

purchaser or mortgagee of lands, which are already in mortgage, to take a conveyance of the legal estate direct from the former mortgagee, as that secures the same priority over mesne incumbrances as the former mortgagee had. But in the case of a purchase followed immediately by a mortgage, the risk run by the new mortgagee allowing the legal estate to be conveyed to the *purchaser* is very different from and far less than that incurred by a purchaser allowing an outstanding legal estate to be got in by the *vendor*. In the latter case the vendor has presumably been in possession of the land, and has had both the right and the opportunity of creating mesne incumbrances. In the former instance the purchaser has never been in possession either of the land or of the title deeds; and it is only by fraud that he can have executed, prior to the new mortgage, such a conveyance as would estop the new mortgagee from claiming the legal estate. A fraudulent mortgage of this kind, induced by false title deeds, was in fact made by an intending purchaser of land in the case, which called forth the learned judge's remarks: but as the mortgage deed contained no recitals at all, there was no estoppel as against the mortgagee from the purchaser. He suffered, however, the inconvenience of defending an action brought against him by the prior mortgagee. This shows that the only quite safe course is to follow the learned judge's advice. But the common practice is still pursued in many such cases, partly on account of its convenience, and partly because the only risk run is that of fraud, which is an exceptional occurrence.

In connexion with the subject of getting in the legal estate direct from a first mortgagee as a protection against mesne incumbrances, the reader may be reminded that, if the purchaser receive notice, actual or constructive, before the purchase money be fully paid, of some

Purchaser
receiving
notice of
mesne incum-
brances.

mesne equitable incumbrance, he cannot safely complete without the incumbrancer's concurrence in the conveyance to him (*a*) ; and further that, if after the receipt of such notice the purchase should be completed with the concurrence only of the first mortgagee, who on being paid off out of the purchase money conveyed the legal estate and released his security, the purchaser would not be able to avail himself of the priority, which was enjoyed by the first mortgagee, as a protection against the mesne incumbrance, unless the intention appeared to keep alive for his own benefit the charge created by the first mortgage (*b*). In such a case, therefore, this intention should be clearly expressed in the deed of conveyance, though it would not be necessary to take an actual transfer of the first mortgage to a trustee for the purchaser (*c*). As we have seen (*d*), the purchaser is entitled, if he think fit, to keep alive for his own use any mortgage existing on the property sold either by express declaration or by having the same transferred to a trustee for him, or to a new mortgagee advancing part of the purchase money, provided always that he pay any increased expense thereby caused to the vendor. It may be thought that, where a mortgage is paid off out of the purchase money, it would always be desirable to keep alive the charge, in order to protect the purchaser against any mesne incumbrance of which he might, without knowing it, have received constructive notice (*e*). But it never was, and is not now, the practice to do this, the risk run being too small to counterbalance the inconvenience of always maintaining the charge (*f*).

(*a*) Above, pp. 565, 566 ; *Jared v. Clements*, 1903, 1 Ch. 428.

(*b*) Above, p. 481.

(*c*) Above, p. 481.

(*d*) Above, pp. 481, 624.

(*e*) This was the case in *Toulmin v. Steere*, 3 Mer. 210 ; above, p. 480.

(*f*) See Davidson, *Proc. Conv.* vol. ii. pt. i. 290, 324, 327, 4th ed., from which it is obvious that it was not the practice to keep alive a mortgage paid off out of the purchase money unless there were reason to suspect the existence of some mesne incumbrance :

And under the present law as to constructive notice, the purchaser is no longer in danger of being affected with any notice acquired by his solicitor in some previous transaction of an equitable charge on the property (*g*). Where part of the purchase money is to be advanced by a new mortgagee, who requires that the legal estate shall be conveyed direct from some already existing mortgagee to himself (*h*), the purchaser must take care that the whole estate in the lands sold be conveyed to the new mortgagee by the deed of conveyance completing the sale and a new equity of redemption limited to himself by the same deed. He will then be as well protected against unknown prior equities as the new mortgagee himself, for he will claim as purchaser under the same conveyance of the legal estate. But if he were to allow the new mortgagee to take a simple transfer of the old mortgage and himself take a conveyance from the vendor alone, he would be exposing himself to all the risks attendant on the purchase of an equity of redemption (*i*).

It is beyond the scope of the present work to give a complete account of all the principles and rules which ought to be observed in framing conveyances on sale. A few points must, however, be noted. And first, as to the extent to which the vendor's title should be recited or noticed. This will depend on the state of the title: but the general principle to be observed is that any recitals or statements inserted in the conveyance should not carry the history of the title any further back than is necessary in order to explain the assurance thereby made (*k*). Thus, where on investigation of the title, the vendor has proved that he is himself absolutely

Framing the conveyance.

Recitals.

1 *Key & Elph. Prec. Conv.* 483.
190, 4th ed. : 481, 486, 8th ed.

g) Above, pp. 246—254.

h) Above, p. 625.

i) Above, pp. 476 *sq.*

k) See 1 *Dart, V. & P.* 518,
5th ed. : 590, 6th ed. : 545, 7th
ed.

entitled to the whole estate contracted for in the land sold, it is in general unnecessary to show in the conveyance how he became so entitled. In such cases recitals may be dispensed with altogether (*l*). The old conveyancing practice, however, was to recite the conveyance to the vendor (*m*): although, as we have seen (*n*), if any recital at all be made, it is best for the purchaser that it should be a precise recital (as of the vendor's seisin in fee, in the case of freeholds) sufficient to estop the vendor and all claiming under him from setting up a legal estate, which they have not at the time of conveyance, but may subsequently acquire (*o*). But it is thought to be permissible to depart from this principle where the vendor's title depends on proof of facts, as distinguished from deeds or other assurances (*p*). In such cases it is often convenient to recite the facts in order that on any resale of the land to be made after twenty years' time, the recitals may be used as *prima facie* evidence of the facts (*q*). For example, where the vendor became entitled to the land sold as the heir of an intestate, it is very useful to recite the various matters of pedigree which establish the heirship (*r*); and this is particularly the case where the fact material to the title is negative, as that one had or left no issue (*s*). The utility of similar recitals is equally obvious where the vendor's title depends on the determination of an estate tail or of successive estates tail. Where land sold is subject to outstanding estates or incumbrances, which are all got in or released by the deed of conveyance (*t*), it will, as a rule, be necessary to

(*l*) See Davidson's Prec. Conv. vol. i. p. 44; vol. ii. pt. i. pp. 229 sq., 4th ed.

(*m*) Wms. Real Prop. 140, 363, 1st ed.; 192, 514, 13th ed.

(*n*) Above, p. 622.

(*o*) Sug. V. & P. 558.

(*p*) See 1 Dart, V. & P. 519, 5th ed.; 591, 6th ed.; above, p. 116.

(*q*) See above, p. 136.

(*r*) Above, pp. 131, 153; see also, p. 138.

(*s*) Above, p. 132.

(*t*) Above, p. 620.

recite the assurances under which the various conveying parties claim; and this may of course involve the statement of the title prior to the acquisition of the land by the vendor: but in these cases also the same principle should be observed of not carrying the title further back than is necessary to explain the operative part of the deed. The draftsman's aim should be to frame a deed which shall be capable of serving as a good root of title (*u*) in time to come. For this reason it is desirable that the conveyance should show clearly the origin of every outstanding estate or interest assured, but should contain no reference to any documents or matters which it would be inconvenient to produce or explain on any future dealing with the land, when the present conveyance might be treated as the root of title. For this reason also no assurance or other document, which is not a necessary part of the title, should ever be recited or noticed. Thus contracts for the sale of land, which are in general superseded by the conveyances made in pursuance thereof, should never be stated in recital as being entered into by some particular document, unless in exceptional circumstances making that document an essential part of the title (*x*). The agreement only to sell is commonly referred to in conveyances on sale, the written memorandum of the contract not being mentioned (*y*). As we have seen (*z*), the vendor cannot be required to execute a deed containing any recital, which is contrary to the truth: but he cannot object to execute an assurance, which will duly carry out his obligation of conveying the property sold, but contains no recitals (*a*).

With respect to the parcels or description of the pro- Parcels.
 perty sold, it appears that the purchaser is entitled to

<p>(<i>u</i>) Above, p. 106. (<i>x</i>) See above, p. 531. (<i>y</i>) 1 Dart, V. & P. 524, 5th ed. : 595, 596, 6th ed. : 550, 7th</p>	<p>ed. : above, p. 628, nn. (<i>l</i>), (<i>m</i>). (<i>z</i>) Above, p. 616. (<i>a</i>) <i>Hartley v. Burton</i>, L. R. 3 Ch. 365.</p>
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have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract be misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstances the vendor could not refuse to convey the land by the new description (*b*). It is, however, questionable whether a vendor, who has sold lands by a description accurately applying to them, and has completely discharged the obligations imposed on him of proving the identity of the lands described in the contract with those described in the muniments of title and with those of which possession is offered (*c*), can be required to convey and to covenant for title by a different description from that by which he sold. If he has satisfactorily proved title and identity, his only remaining obligation seems to be to convey what he has contracted to sell, that is, the land described in the contract; and it is thought that in such case he cannot be compelled to undertake the burden of verifying a new description of the lands (*d*). We have seen that the vendor lies under a double duty in respect of proving identity; he is bound, first, to identify the land described in the contract with that described in the title deeds, and secondly, to identify the actual land offered by him in fulfilment of the contract with that described in the contract (*e*). It is thought that, where the vendor's second duty cannot be performed without extrinsic evidence explanatory of the description in the

(*b*) See Davidson, *Prec. Conv.* i. 82 *sq.*, 4th ed. The above passage in the text (p. 557, 1st ed.) was approved of by Swinfen Eady, J., in *Re Sanson and Nar-*

beth's Contract, 1910, 1 Ch. 741, 749.

(*c*) Above, pp. 43, 144, 171.

(*d*) Above, p. 619, and n. (*x*).

(*e*) Above, pp. 33, 41, 43.

contract (*f*), the purchaser is entitled to have such a description inserted in the conveyance as will on the face of it identify the land thereby conveyed with that of which he is to be put in possession. But if the description contained in the contract be of itself completely sufficient to identify the land sold with that offered in fulfilment of the contract, it is submitted that the purchaser is not entitled to require any other or further description to be inserted in the conveyance.

The important question, in what cases is the purchaser entitled to have the property conveyed by reference to a plan, can only rightly be solved by applying these principles. This question arose in two recent cases: but in each of them the judge evaded the necessity of deciding it (*g*). In *Re Sparrow and James' Contract*, Farwell, J. (after remarking that it was unnecessary to determine the general question whether the purchaser is in all cases entitled to have a description of the property conveyed by reference to a plan), considered that, where the description contained in the contract is insufficient or unsatisfactory as a means of identifying the land sold with that proposed to be conveyed in fulfilment of the contract, the purchaser is entitled to have the property more precisely described; and in the circumstances of the case the learned judge decided that the purchaser was entitled to have the description in the contract supplemented (without any restriction) by a plan (*h*). In *Re Sansom and Narbeth's Contract*,

When is the purchaser entitled to a conveyance by reference to a plan?

Re Sparrow and James' Contract.

(*f*) See above, p. 61.

(*g*) *Re Sparrow and James' Contract*, 1910, 2 Ch. 60, 62; *Re Sansom and Narbeth's Contract*, 1910, 1 Ch. 741, 750, 751.

(*h*) See the judgment in *Re Sparrow and James' Contract*, 1910, 2 Ch. 60, 62, 63. Note however that in that case a plan was attached to the conditions of sale,

with a statement to the effect that it was for reference only and its accuracy was not guaranteed. The purchaser proposed to take a conveyance by a general description referring to more particular descriptions in a schedule and a plan. The vendor desired to have the words "by way of elucidation and not of warranty"

*Re Sanson and
Narbeth's
Contract.*

Swinfen Eady, J. (after citing with approval the above-noted passage in this book (*i*)), laid down that in all simple cases, in which a plan would assist the description, the purchaser has a right to have a plan on the conveyance, and that this follows as part of the rule that the purchaser is entitled to take a conveyance in his own form: though the learned judge declined to say that in every case the purchaser is entitled to have a description by plan (*k*). It is respectfully submitted that this pronouncement is unsatisfactory in principle; and that a sounder rule is suggested in the judgment of Farwell, J., viz., that, where the description in the contract is without a plan insufficient to identify the property sold, the purchaser may require it to be supplemented by a plan. It seems to be implied from this that no plan can be required where the description in the contract affords a sufficient and satisfactory identification of the land sold. The question remains however whether, when the description in the contract is of itself (without extrinsic evidence) insufficient to identify the land sold, the purchaser is entitled to insist that this description shall be elucidated by a plan and not merely by a further and better verbal description. On this point the above-mentioned decisions are authorities in favour of the purchaser's right to a conveyance by reference to

inserted before the reference to the plan; and the point actually decided was that, the fact being that the verbal description was of itself alone insufficient to identify the land, the vendor was not entitled to insist on the insertion of those words.

(*i*) Above, p. 630, n. (*b*).

(*k*) *Re Sanson and Narbeth's Contract*, 1910, 1 Ch. 741, 749, 750. In that case the contract contained only a general description of the property sold not defining the measurements or boundaries thereof; and it seems clear that the purchaser (unless

precluded by the fact that the vendors sold as trustees; see below, pp. 634, 635) was entitled to a more detailed description than was contained in the contract. In the latest title deed under which the vendors claimed the property was described by reference to a plan; it was agreed before the summons came on for hearing that the purchaser should have a copy of this plan on his conveyance; and the summons was only heard to determine the question of costs. It was decided that the vendors must pay them.

a plan. But it is respectfully submitted that, where the land sold can be satisfactorily identified by a further or better verbal description than is contained in the contract, and the vendor offers to convey by such a description, it does in truth subject the vendor to an additional burthen if he be required also to convey by reference to a plan, which he must necessarily employ (and pay) his own surveyor to check. And it is further submitted that the rule, that the purchaser may take his conveyance in what form he pleases, is qualified by the proviso that the burthen laid on the vendor by the purchaser's choice be not materially increased, in respect of expense or otherwise (*l*). With great respect for Mr. Justice Swinfen Eady, it is thought that he did not make sufficient allowance for this limitation of the rule. In the present state of the authorities, vendors of land should be particularly careful, where they desire not to convey by reference to a plan, to describe the property sold in the contract with complete verbal accuracy, or to stipulate expressly that they shall not be required to convey by reference to a plan or at least that any reference in the conveyance to a plan shall be made solely by way of illustration of the verbal description of the property sold and not so as to make the plan any part of the description by which the vendor conveys.

It is always desirable, in the purchaser's interest, that the conveyance should contain a complete verbal description, independent of any plan, of the property

Description independent of or by reference to a plan.

(*l*) Above, p. 620. See an article on the subject above discussed in 26 L. Q. R. 268; but it is respectfully submitted that the learned author has overlooked the vendor's double duty of identification, and the fact that in a contract to sell land the property sold may be described with suffi-

cient certainty to make the contract specifically enforceable, although the vendor may be obliged to resort to extrinsic evidence to prove that the actual land offered in fulfilment of the contract is the same as that sold; above, pp. 6, 630, 631.

Connecting a new description with the old.

Mortgagees and trustees convey by the description under which they took.

sold and that any plan of the land referred to or drawn on the deed should be auxiliary only (*m*). If, as is sometimes unavoidable, the property is so described by reference to a plan that the plan is made a material part of the description (*n*), extreme care should be taken in checking the accuracy of the plan (*o*). When lands are conveyed by a new description not contained in any of the title deeds, it is always desirable in framing the deed of conveyance to connect the new description with the old by stating that the lands were formerly known by the old description (giving it) (*p*). Such a statement will in twenty years become *prima facie* evidence of identity on sales (*q*). When mortgagees, who are paid off, or trustees join in a conveyance on sale, they are not, as a rule, bound to convey by any other description than that by which the land was conveyed to them (*r*). If in such cases a new description be desirable for and can be required by the purchaser, and the mortgagees or trustees will not abate anything of their strict rights, the conveyance must be so framed that the mortgagees or trustees convey by the old description, and that any conveyance of the

(*m*) 1 Dart, V. & P. 530, 5th ed.; 601, 6th ed.; 554, 7th ed.; Davidson, Prec. Conv. i. 85, 86, 4th ed.; i. 65, 66, 5th ed. It may be noted that the converse of the question above discussed may arise, viz. whether the purchaser can require a verbal description by measurements and boundaries to be inserted in the conveyance, when the land sold is described in the contract by reference to a plan. The writer is not aware of any authority on this point, but it can only be decided by applying the principles above stated; see pp. 630 sq.

(*n*) See above, p. 115.

(*o*) For instances of the effect of a conveyance of lands described by reference to a plan, which was inaccurate, see *Llewellyn v. Jersey*,

11 M. & W. 183; *Lyle v. Richards*, L. R. 1 H. L. 222; *May v. Platt*, 1900, 1 Ch. 616; *Horne v. Struben*, 1902, A. C. 454; *Mellor v. Walmesley*, 1904, 2 Ch. 525, 1905, 2 Ch. 165. For an example of a reference to a schedule of parcels and a plan controlling a general description, see *Barton v. Dawes*, 10 C. B. 261; *Re Brocket*, 1908, 1 Ch. 185, 195, 196. For a case of an ambiguous general description being controlled by recitals, see *Walsh v. Trevanion*, 15 Q. B. 733.

(*p*) Davidson, Prec. Conv. i. 83, 4th ed.; i. 63, 5th ed.

(*q*) Above, p. 136.

(*r*) *Goodson v. Ellisson*, 3 Russ. 583, 594; see *Mostyn v. Mostyn*, 1893, 3 Ch. 376.

land by the new description or any statement that the land conveyed by the old description is now more accurately described by the new is the conveyance or statement of the vendor only. Trustees of lands under a simple trust are, however, bound to *execute the estate(s)*; and if the equitable interest therein become vested by assignment or otherwise in several persons, of whom each is entitled in severalty to a particular parcel of the lands, the trustees must at the request of all convey to each the legal estate in his own part; and this may of course involve their conveying by a new description (*t*). But there is an oft-cited *dictum* of Lord Eldon (*t*) that a trustee cannot be compelled to divest himself of his trust by different parcels at different times. It appears, however, that an assignee from the *cestui-que-trust* of a part of the trust property is entitled, on proving to the trustee that the whole equitable estate or interest in that part is now vested absolutely in himself, to require the trustee to convey to him the legal estate or interest therein (*u*). Where trustees are themselves vendors of land, it does not appear that they are exonerated from the duties of identifying the land offered in fulfilment of the contract with that described therein and of conveying the land sold by a description sufficient to establish such identity, even though they sold as trustees (*v*). Mortgagees cannot of course be required to release from their security any part of the land charged without the whole amount due to them being

(s) Wms. Real Prop. 171, 181, 21st ed.

(t) *Goodson v. Ellison*, 3 Russ. 583.

(u) This is clearly established with regard to funds of money or stock, &c.: *Smith v. Snow*, 3 Madd. 10; *Lemaghan v. Smith*, 2 Ph. 301, 302; *Re Rudeliff*, 1892, 1 Ch. 227; *Re Palmer*, 1907, 1 Ch. 486; and it seems from the decree ultimately made that this principle was really

recognised by Lord Eldon in *Goodson v. Ellison*, 3 Russ. 596, subject to the trustee's right to be protected by the order of the Court in a case of doubt or difficulty.

v See *Re Sanson and Narbeth's Contract*, 1910, 1 Ch. 741, 749; above, p. 632, n. *k*; though in that case it was considered that the trustees themselves took under a conveyance referring to a plan.

paid (*x*). But it sometimes happens, where a small portion of lands in mortgage is sold, that the mortgagees, being satisfied that the remainder of the lands is an ample security for the money due to them, concur in the conveyance to the purchaser to convey the legal estate and release their charge without receiving any part of the purchase money. No difficulty can arise when this course is taken, if the mortgagees be beneficially entitled to the mortgage money, or if the purchaser have no notice that they are not so entitled (*y*). In either case he takes as a purchaser for value from the mortgagees, they conveying to him at the mortgagor's request in consideration of his paying the purchase money to the mortgagor; and there is no question of the adequacy of this consideration as regards the mortgagees, where they are apparently entitled for their own use. But if the purchaser should have notice that the mortgagees are trustees of the mortgage money, the question arises whether they have power, as against their *cestui-que-trusts*, to release gratuitously any part of their security. It is said that, at least where the trustees have the usual power of varying investments, they are justified in so releasing a portion of the property charged, provided that their security is not substantially impaired (the transaction being equivalent

Trustee-mortgagees gratuitously releasing part of their security.

tr. The rule was that the only right enforceable by a mortgagor, and those claiming under him, against a mortgagee, whose estate had become absolute at law, was the equity of redemption on repayment of principal, interest and costs: *Dunstan v. Patterson*, 2 Ph. 341, 345; *Chichester v. Donegall*, L. R. 5 Ch. 497, 502. This rule has been modified by enactments in the Conveyancing Act of 1881 obliging mortgagees to execute a transfer of their

mortgages, instead of reconveying, on the terms on which they would be bound to reconvey, and giving to mortgagors under mortgages made after that year the right to inspect the title deeds of the mortgaged property: but otherwise it remains in full force. See stats. 44 & 45 Vict. c. 41, ss. 15, 16; 45 & 46 Vict. c. 39, s. 12; *Teevan v. Smith*, 20 Ch. D. 724; above, pp. 124, 125, and notes.

(*y*) Above, p. 238.

to the calling-in and re-investment of the money secured), and that the purchaser is entitled to assume that their power has been properly exercised (z). But it must not be forgotten that trustees advancing money on mortgage of land have no right to release any part of the land charged for the mere convenience of the mortgagor (a); even in exercising an express power to release or compromise a claim, they are bound to act reasonably and in good faith for the advantage of their *cestui-que-trusts* (b). It seems, therefore, that where mortgagees, being to the knowledge of the purchaser trustees, release part of the mortgaged lands to a purchaser without any valuable consideration given to them, they act, *prima facie*, to the disadvantage of their *cestui-que-trusts*, and the purchaser appears to take the risk of proving that the transaction was proper; failing which the release would be invalid against the beneficiaries (c). And it is certainly advisable for a purchaser, proposing to accept such a conveyance from trustee-mortgagees, to satisfy himself that their security will not be impaired in any substantial degree by the release, and to obtain evidence of this fact, which he can produce on any future sale or mortgage of the land.

As is well known, before the year 1882 it was the practice in drawing conveyances of land to add to the *parcels*, or description of the property to be assured, a number of *general words*, comprehending all easements, rights, privileges or advantages appertaining or reputed to appertain thereto or therewith used and enjoyed (d).

(z) Davidson, *Proc. Conv.* vol. ii. pt. i. 347, n., 4th ed.; see Dart, *V. & P.* 612, 5th ed.: 689, 6th ed.: 630, 7th ed.

(a) See Lewin on Trusts, 495, 6th ed.; 706, 10th ed.

(b) See *Blane v. Marshall*, 3 P. W. 381; *Pennington v. Healey*, 1 C. & M. 402, 407; *Re Alexander*, 13 Ir. Ch. 137.

(c) See *Pell v. De Winton*, 2 De G. & J. 13; Dart, *V. & P.* 612, 613, 5th ed.: 689, 690, 6th ed.: 630, 631, 7th ed.

(d) *Wms. Real Prop.* 193, 331, 515, 13th ed.; 427, 613, 623, 21st ed.; Davidson, *Proc. Conv.* vol. i. 91 sq.; vol. ii. pt. i. 231, 4th ed.

This addition was unnecessary and of no effect as regards any rights legally appendant or appurtenant to the land conveyed; for all such rights pass by a conveyance of the land without being mentioned (*e*). But so far as the general words comprised any privileges or advantages *used or enjoyed* with the land conveyed, they might have the effect of an express grant by the conveying party, as a legal easement or right, of some privilege or advantage previously used or enjoyed, for the benefit of or in connexion with the land conveyed, over some other land of his own (*f*). Since the Conveyancing Act of 1881 (*g*) took effect, it has been the practice to omit general words from conveyances in reliance on the provisions contained in the 6th section of that Act. These provisions resemble the general words formerly in use, not only in including in conveyances a superfluous assurance of all easements and rights appertaining to the land conveyed, but also in incorporating therein an express conveyance of all privileges or advantages enjoyed with the land conveyed *at the time of conveyance* (*h*); and this conveyance may operate, in the same manner as general words, to grant, as a legal easement or right, some privilege or advantage enjoyed in fact at the time of conveyance for the benefit of the land assured over other land belonging to the grantor (*i*). It is therefore necessary to consider what

(*e*) Litt. s. 183; Co. Litt. 121 b; Williams on Commons, 315; *Beddington v. Atlee*, 35 Ch. D. 317, 326.

(*f*) *Watts v. Kelson*, L. R. 6 Ch. 166; *Kay v. Orley*, L. R. 10 Q. B. 360; *Barkshire v. Grubb*, 18 Ch. D. 616; Williams on Commons, 170, 315—319, 323, 324; Wms. Conv. Stat. 64—66.

(*g*) Stat. 44 & 45 Vict. c. 41, which came into operation immediately after the 31st December, 1881; see Wms. Conv. Stat. 60 sq.

(*h*) This does not exactly follow the usual form of general words, which mentioned all rights, &c. *now or heretofore* enjoyed with the land. As to the effect of this difference, see *Hall v. Byron*, 4 Ch. D. 667, 671, 672; Wms. Conv. Stat. 68.

(*i*) *Broomfield v. Williams*, 1897, 1 Ch. 602; *International Tea Stores Co. v. Hobbs*, 1903, 2 Ch. 165; see *Quicke v. Chapman*, 1903, 1 Ch. 659.

easements or like privileges a purchaser of land may require to be conveyed to him.

A contract for the sale of a piece of land, either with or without mention of "the appurtenances," passes (equally with a conveyance at common law of the legal estate therein (*k*)) only such rights, privileges or easements as are legally appendant or appurtenant thereto; and does not, in absence of special stipulation, entitle the purchaser to have conveyed to him any privileges or advantages which were used by the vendor in connexion with the land sold over adjoining or other land of his own, but are not *necessary* for the enjoyment of the property as sold (*l*). And the 6th section of the Conveyancing Act of 1881 (*m*) affects only conveyances of land made by deed and does not apply to contracts for the sale of land (*n*). It follows, therefore, that if the conveyance, as drawn on the purchaser's behalf, incorporate tacitly, according to the present practice, the provisions of this enactment, and these provisions would, if uncontrolled, operate to grant to the purchaser as an easement or a right some advantage previously enjoyed in fact by the vendor, but not included in the contract

What easements or other privileges the purchaser can require to be conveyed to him.

(*k*) Wms. Real Prop. 427, 21st ed.; Wms. Conv. Stat. 64, 65; above, p. 638.

(*l*) *Bolton v. Bolton*, 11 Ch. D. 968; *Barkshire v. Grubb*, 18 Ch. D. 616, 620; *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595. But, of course, if the vendor induce the purchaser to enter into the contract by a representation that he shall have some privilege over other land of the vendor's, the vendor cannot enforce the contract without granting the same as a legal right: see the last mentioned case. See also *Birmingham, &c. Banking Co. v. Ross*, 38 Ch. D. 295;

Burrows v. Lang, 1901, 2 Ch. 502; *Godwin v. Schweppe's, Ltd.*, 1902, 1 Ch. 926; above, pp. 429, 430. So the sale of a house having windows overlooking land not belonging to the vendor implies no warranty that the vendor has a right to the access of light through those windows: *Greenhough v. Brindley*, 1901, 2 Ch. 324; but if the vendor were to represent (contrary to the fact) that he had such right, he could not enforce the contract.

(*m*) Stat. 44 & 45 Vict. c. 41 see sect. 2 (*v*); above, p. 638.

(*n*) *Re Peck and London School Board*, 1893, 2 Ch. 315, 318.

for sale, the vendor is entitled to require that words shall be inserted modifying the statutory provisions to the extent necessary to give to the contract for sale its true effect (*o*). And in such cases the vendor should be most careful to have the effect of the enactment in question duly limited by express words, or he may find, after conveyance, that he has subjected the land retained by him to some easement or other right which he did not intend to grant when he made the contract for sale (*p*). If so, he will have no remedy but to bring an action for the rectification of the conveyance; and this relief (apart from fraud) will be granted only in case of common and not of unilateral mistake (*q*). If, however, the use of some privilege or advantage over adjoining land retained by the vendor be necessary to the proper enjoyment, as contemplated by the contract (*r*), of the property sold, the purchaser will be entitled to have that privilege or advantage granted to him by the conveyance as a legal easement or right. Indeed, where the easement would be necessary and continuous, as in the case of a right to the access of light, or even necessary only, such as a way of necessity (*s*), a grant thereof would be implied from the mere conveyance of the land to which it was necessarily accessory. But in such cases the purchaser is not obliged to rest content with such grant as would be implied in law from the conveyance of the land. He is certainly entitled to

(*o*) *Re Peck and London School Board*, 1893, 2 Ch. 315, and *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595.

(*p*) See *Broomfield v. Williams*, 1897, 1 Ch. 602; *Pollard v. Gare*, 1901, 1 Ch. 834; *International Tea Stores Co. v. Hobbs*, 1903, 2 Ch. 165.

(*q*) 2 Dart, V. & P. 744, 5th ed.; 838, 839, 6th ed.; 742, 743, 7th ed.; *May v. Platt*, 1900, 1 Ch. 616; see below, Chap. XIII. § 2.

(*r*) See *Bayley v. Great Western Rail. Co.*, 26 Ch. D. 434, 441, 442, 452, 453; above, pp. 429, 430.

(*s*) See *Wheeldon v. Burrows*, 12 Ch. D. 31; *Broomfield v. Williams*, 1897, 1 Ch. 602, 610, 612; *Pollard v. Gare*, 1901, 1 Ch. 834; *Cable v. Bryant*, 1908, 1 Ch. 259; and consider the case cited in the previous note. As to drains, see *Ewart v. Cochrane*, 7 Jur. N. S. 925, 4 Macq. 117; *Williams on Commons*, 319, 324.

have such an express grant of the privilege or advantage in question as would be made by incorporating in the conveyance, without any restriction, the statutory general words. And since the object of the conveyance is to carry out with certainty the intention of the parties to the contract, it is thought that, if the conveyance as drawn on the purchaser's behalf contain a grant defining accurately in express words some privilege or advantage impliedly sold by the contract and to be enjoyed over some land retained by the vendor, the vendor cannot object to execute the conveyance in that form. As the vendor may, where necessary, exclude or restrict the operation of the statutory general words and, in place thereof, define his liabilities in express and unambiguous terms (*t*), so the purchaser is not obliged to accept the general description of his rights which would be given by such general words (a description which cannot be reduced to certainty without proof of the facts existing at the time of conveyance (*u*)), but is entitled to have such rights particularly and exactly defined (*x*). Any easements or other accessory rights expressly mentioned in the contract as being included in the sale should of course be expressly granted in the conveyance.

Where the vendor has stipulated in the contract for the reservation in his own favour of any easement or other right over the land sold, care must be taken that due effect is given to such stipulation in the conveyance; otherwise the vendor will have no remedy to assert his right but to sue for rectification of the conveyance (*y*).

Reservations
in the ven-
dor's favour.

(*t*) Above, p. 640.

(*u*) See the cases cited above, p. 638, nn. (*f*), (*h*), (*i*).

(*x*) See *Bolton v. Bolton*, 11 Ch. D. 968; *Barkshire v. Grubb*, 18 Ch. D. 616, 620; *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's*

Contract, 1900, 2 Ch. 595; and consider *Re Birmingham &c. Co. and Allday*, 1893, 1 Ch. 342.

(*y*) See *Techay v. Manchester, &c. Rail. Co.*, 24 Ch. D. 572; Williams on Commons, 322; below, Chap. XIII. § 2.

The vendor may be entitled to some reservation over the property sold, not only by express agreement, but by implication from the circumstances surrounding the contract; as where the purchaser buys with notice of the fact that the adjoining property of the vendor is laid out for building, and access thereto across the land sold will obviously be necessary (z). And a vendor may by the like implication, as well as by express contract, be entitled to reserve to himself the unrestricted use of some adjoining land of his, which would otherwise have become subject to an easement or right (as to access of light) in the purchaser's favour (a); as where the purchaser of a house with windows overlooking land adjoining and retained by the vendor has notice that the land is laid out for building in a manner obviously inconsistent with the acquisition by the purchaser of any such right (b). But except by virtue of such express or implied contract, the vendor has no claim to the reservation in his own favour of any right over the land sold, or, where the exercise of some easement or privilege over any adjoining land of his would otherwise be necessary to the enjoyment of the property sold, to the reservation in his own favour of such right of free use of the adjoining land as will exclude the acquisition of such privilege or easement (c). For example, if a vendor offer for sale by auction in different lots a house and land adjoining, which the windows of the house overlook, and the land be sold at the auction, but not the house, the purchaser of the land will be entitled to build thereon so as to obstruct the access of light to the windows (d).

(z) *Daries v. Sear*, L. R. 7 Eq. 427.

(a) See above, p. 639.

(b) See *Birmingham, &c. Banking Co. v. Ross*, 38 Ch. D. 295; *Godwin v. Schweppes, Ltd.*, 1902, 1 Ch. 926.

(c) See above, pp. 639, 640, and cases there cited.

(d) *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Buddington v. Atlee*, 35 Ch. D. 317; *Ray v. Hazeldine*, 1904, 2 Ch. 17.

Whereas, if the house were sold but not the land, the purchaser would acquire by implication an easement of access of light over the land and the vendor would not be entitled to build so as to obstruct such access (*e*); unless, as we have seen, the purchaser bought with notice of the vendor's intention to build thereon in a manner inconsistent with the acquisition of such an easement (*f*). And if both lots were sold at the same time, the purchaser of the house would acquire an easement of the access of light over the land; for on a sale or conveyance at one and the same time to different persons of two tenements belonging to the same owner, there is implied, unless a contrary intention appear, a grant of all easements over one tenement which are necessary for the enjoyment of the other (*g*). Where two tenements belonging to one owner exercise each over the other some privilege necessary to their proper enjoyment, as where two houses are built together and supported by one party wall, then, on a sale or conveyance of one of the tenements, there will be implied, not only a grant of an easement of support in favour of the purchaser or other alienee, but also a reservation of the like easement to the owner retaining the other tenement (*h*).

If the property were sold subject to some particular incumbrance, which is to remain undischarged, such as a mortgage, restrictive covenants, an easement, or a subsisting tenancy for any term, the vendor is of course

Where the property is sold subject to some incumbrance.

(*e*) *Palmer v. Fletcher*, 1 Lex. 122; *Holt, C. J., Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093; *Thesiger, L. J., Wheeldon v. Burrows*, 12 Ch. D. 31, 51; *Jessel, M. R., Allen v. Tivlar*, 16 Ch. D. 355, 357, 358; *Cable v. Bryant*, 1908, 1 Ch. 259.

(*f*) Above, pp. 641, 642.

(*g*) *Swanborough v. Carentry*, 9 Bing. 305; *Burrows v. Latch*, 4 Q. B. D. 494; *Allen v. Tivlar*, 16 Ch. D. 355.

(*h*) *Richards v. Rose*, 9 Ex. 218; *Thesiger, L. J., Wheeldon v. Burrows*, 12 Ch. D. 31, 51; and see *Jones v. Pritchard*, 1908, 1 Ch. 630, 635, 636.

entitled to require that it shall be expressed in the conveyance that he conveys the land sold subject to the incumbrance in question. And the conveyancer acting for him should be particularly careful to see that this is done; as the statutory covenants for title, which are now usually incorporated in conveyances on sale, include covenants for right to convey and quiet enjoyment, subject only as *expressed* in the conveyance, and for freedom from incumbrances other than those subject to which the conveyance is *expressly* made (*i*). So that if the vendor omit to specify in the conveyance the incumbrance, subject to which he sold, and convey as beneficial owner, he lays himself open to an action on his covenants for title, to which his only defence would be to plead the terms of the contract for sale and counterclaim for rectification of the conveyance (*k*). Where the contract for sale contains the common stipulation (*l*) that the property is sold subject to all chief and other rents, rights of way and water and other easements (if any) charged or subsisting thereon, and to all leases, tenancies and occupations, whether mentioned in the particulars of sale or not, and to all rights and claims of lessees, tenants and occupiers, it may perhaps be argued that the vendor is in strict law entitled to insist that he shall convey according as he contracted to sell, namely, subject to these incumbrances; and that none the less, where the purchaser has inquired whether there are any such incumbrances (*m*) and received the reply that the vendor is not aware of any (*n*). For as we have

(*i*) Stat. 44 & 45 Vict. c. 41, s. 7 (1A).

(*k*) See *Page v. Midland Rail. Co.*, 1894, 1 Ch. 11; *May v. Platt*, 1900, 1 Ch. 616; *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316; below, Chap. XIII. § 2. As to obtaining rectification on this ground, see *Coldcot v. Hill*, 1 Ch. Ca. 15; *Feilder v.*

Studley, Finch, 90; Sug. V. & P. 609; 2 Dart, V. & P. 786, 5th ed.; 886, 6th ed.; 794, 795, 7th ed.

(*l*) Above, p. 73, and n. (*l*).

(*m*) Above, p. 175.

(*n*) It is submitted that if the vendor has answered positively that there are not any such incumbrances, he cannot insist on

seen(*o*), it is only against such incumbrances as the vendor was not aware of that this stipulation has any force; and the vendor certainly appears to be entitled to limit his liability under the statutory covenants for title, so that he shall not be sued for any defects of title so arising. But it is not, and has never been, the practice of conveyancers to insert in conveyances on sale any words qualifying, by reference to possible incumbrances of this kind, either the assurance made or the covenants for title entered into by the vendor (*p*); for it is understood that the stipulation in question is merely intended to protect the vendor against any objection to the title on account of incumbrances of the kind mentioned, which may exist without the vendor's knowledge, and may be discovered in the course of the investigation of title, and that the purposes of the clause are exhausted when the title has been investigated without the discovery of any such incumbrance (*q*). And it would be a great hardship on the purchaser for such words to be inserted in the conveyance, as they would put everyone taking under the conveyance upon inquiry, whether there were such incumbrances or not (*r*). It is thought, therefore, that the Court would not oblige a purchaser, who bought under such a stipulation, to accept a conveyance, in which the assurance made by the vendor was qualified by such words, especially when it is considered that under an innocent conveyance (*s*) the vendor assures the land described for such estate or interest only as he really has therein and subject to all legal liabilities

having the same mentioned in the conveyance.

(*o*) Above, pp. 73, n. (*l*), 175.

(*p*) This appears from an examination of the precedents contained in Davidson, *Prec. Conv.* vol. ii. pt. i. 4th ed., considered with reference to the fact that the stipulation in question is one of the general conditions of sale:

Ibid. i. 611, 4th ed.; i. 521 and n., 5th ed. See also 1 *Key & Elph. Prec. Conv.* 260, n. (*c*), 4th ed.; 248, n. (*d*), 8th ed.

(*q*) *Dart, V. & P.* 156, 5th ed.; 176, 6th ed.; 172, 7th ed.

(*r*) *Re Abns Corn Charity*, 1901, 2 Ch. 750.

(*s*) Above, p. 623, n. (*v*).

actually affecting the same (*t*). But it is thought that the vendor would be entitled to insist on limiting the statutory covenants for title so that they should not extend to indemnify the purchaser against any incumbrance, whether known or unknown, subject to which the sale was expressly made. It is not, however, the practice to insist on such a limitation with regard to the possible incumbrances specified in the above-mentioned common condition of sale. If in any particular case it were desired to insist on this limitation of the covenants, it should be carried out by a clause expressly modifying the effect of the statutory covenants and not by expressing that the conveyance is made subject to the incumbrances mentioned in the condition. If it be stipulated in the contract for sale that the property is sold *and shall be conveyed* subject to the incumbrances above mentioned (*u*), the purchaser cannot object to the insertion in the conveyance of the same words as are contained in the contract (*x*). The vendor cannot oblige the purchaser to take a conveyance of the land sold subject to any other incumbrances than those subject to which the purchaser expressly or impliedly (*y*) agreed to buy (*z*).

Sale of such estate as the vendor has.

If the vendor should have sold only such estate or interest as he has in some particular land, he is of course entitled to require that he shall convey the same thing only and in the same words. But if land were sold by a particular description, with a stipulation that

t) *Hardman v. Child*, 28 Ch. D. 712, 717.

u) Above, p. 642.

x) *Gale v. Squire*, 4 Ch. D. 226, 5 Ch. D. 625.

y) As where the purchaser buys with notice that the land is subject to some irremovable incumbrance, and the vendor does

not expressly contract to show a good title; above, p. 203.

z) *Re Monckton and Gilzean*, 27 Ch. D. 555; *Hardman v. Child*, 28 Ch. D. 712; *Mostyn v. Mostyn*, 1893, 3 Ch. 376; *Re Wallis and Barnard's Contract*, 1899, 2 Ch. 515.

the purchaser shall accept such title as the vendor has (*a*), the case is different, and the vendor would be obliged to convey the land as described in the contract, without any words limiting the assurance to his actual interest therein (*b*). In such case, however, it is thought that the contract is equivalent to an agreement to buy subject to such incumbrances or defects of title as may appear upon investigation to exist, and that the vendor would therefore be entitled to limit his covenants for title so as to prevent any action thereon being brought against him by reason of such incumbrances or defects (*c*). It may be observed that the usual vendor's qualified covenants for title, whether given in express terms or incorporated in the conveyance by statute, do not confer any indemnity against the purchaser's eviction by title paramount to that of the vendor's own predecessors in title; they extend only to the purchaser's disturbance by reason of some act, omission or incumbrance, of the vendor himself or any person through whom he derives title, otherwise than by purchase for value (*d*). A disseisor, therefore, or even a man having no title at all, not so much as a disseisor's estate (*e*), if he sold and conveyed *as beneficial owner* the land, into which he had wrongfully entered or which he had wrongfully assumed was his, would incur no liability on the statutory covenants for title in case of the ejection of the purchaser by the rightful owner.

If one sell a single piece of land on the terms that the purchaser shall enter into covenants restrictive of

Sale of land
subject to
restrictive
covenants.

a. Above, p. 202.

(b) See above, p. 646.

c. See the cases cited, above, p. 644, n. (*k*).

(d) *Browning v. Wright*, 2 B. & P. 13; *Hesse v. Stevenson*, 3 B. & P. 565, 574; *Nord v. Marshall*, 1 Brod. & B. 319; *Sturmand v. Forbes*, 6 A. & E. 572; Sug. V.

& P. 602, 603, 605—609; *Howard v. Maitland*, 11 Q. B. D. 695; and see below, Chap. XIX. § 5.

(e) This is an estate in fee simple: see Litt. ss. 519, 520; Williams on Seisin, 7, 10; *Leach v. Jan*, 9 Ch. D. 42, 44, 51 Sol. J. 143.

the use of the land, the vendor is of course not bound, in the absence of express or implied stipulation or of representation to the contrary, to enter into any similar covenants or to observe the like restrictions with regard to any adjoining land retained by him (*f*). If lands be offered for sale in lots, either at *one sale* by auction or in a series of consecutive private sales, on the terms that each purchaser shall enter into restrictive covenants as to the lot bought by him, it is, in the absence of express stipulation, a question to be decided on consideration of all the circumstances and conditions of the sale whether there is implied in the contract for the sale of any lot an agreement that the vendor shall be bound by the restrictive covenants as to any lot remaining unsold (*g*). If it appear that the offer made by the vendor was in effect that each purchaser should have a lot forming part of an estate subject to a general scheme of restrictive covenants enforceable by as well as against all owners of any part thereof, the vendor will be bound to enter into like restrictive covenants with the purchaser, as regards any lot remaining unsold; and will be bound in equity to observe the restrictions, though he do not enter into any such express covenant (*h*). But if it appear that the vendor merely offered each lot to be sold subject to restrictive covenants to be entered into with himself by each purchaser, and did not offer, as part of the contract or as an inducement to buy, the advantage of the whole property put up for sale being subject to the same covenants, then the purchaser of

(*f*) See *Tucker v. Vowles*, 1893, 1 Ch. 195; *Rowell v. Satchell*, 1903, 2 Ch. 212; *Osborne v. Bradley*, 1903, 2 Ch. 446; above, p. 497, n. (*s*).

(*g*) Above, p. 494, and n. (*a*); *Nottingham Patent Brick, &c. Co. v. Butler*, 16 Q. B. D. 778, 784, 785; *Collins v. Castle*, 36 Ch. D. 243.

(*h*) See cases cited in previous note; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Davis v. Leicester*, 1894, 2 Ch. 208, 219, 227, 232; *Holford v. Acton Urban Council*, 1898, 2 Ch. 240; *Rowell v. Satchell*, 1903, 2 Ch. 212; *Elliston v. Reacher*, 1908, 2 Ch. 374, 384, 385, 665.

any lot will have no claim to enforce any restriction over any lot remaining unsold, or to require the vendor to enter into any covenant in respect thereof (*i*). In any case in which it is either an express or an implied term of the contract for sale that any land retained by the vendor shall be subject to any restriction in the purchaser's favour, the purchaser is entitled to require the vendor on completion to enter into a covenant with him to that effect (*k*). The case is exactly parallel to that of an express or implied contract to grant an easement over land retained by the vendor (*l*).

The estate clause always inserted in conveyances of land before the year 1882, and purporting to assure all the conveying party's estate or interest in the land conveyed (*m*), went out of use after the commencement of the Conveyancing Act of 1881 (*n*); the 63rd section of that Act providing that every conveyance shall by virtue of that Act be effectual to pass all the conveying party's estate or interest in the property conveyed, but this enactment shall apply only if and as far as a contrary intention is not expressed in the conveyance and have effect subject to the terms of the conveyance and the provisions therein contained. Having regard to this express saving and to the construction placed on the estate clause formerly usual (*o*), it is thought to be unnecessary expressly to exclude the operation of that enactment upon conveyances assuring in proper terms less than the whole estate of the party conveying, such

(*i*) *Tucker v. Fowles*, 1893, 1 Ch. 195; *Holford v. Acton Urban Council*, 1898, 2 Ch. 240; *Reid v. Bickerstaff*, 1909, 2 Ch. 305; above, p. 648, n. 1 j.

(*k*) *Re Birmingham, &c. Co. and Alday*, 1893, 1 Ch. 34; *Davis v. Leicester*, 1894, 2 Ch. 208, 220.

(*l*) Above, pp. 640, 641.

(*m*) 1 Davidson, *Prec. Conv.* 94, 4th ed.; see *Wms. Conv.*

Stat. 242; *Wms. Real Prop.* 625, 21st ed.

(*n*) Stat. 44 & 45 Vict. c. 41.

(*o*) See *Blundell v. Stanley*, 13 Jur. 998; *Hunt v. Remnant*, 9 Ex. 635; *Roper v. Harrison*, 2 K. & J. 86, 113; *Neame v. Mossom*, L. R. 3 Eq. 91; *Francis v. Manton*, L. R. 2 C. P. 543; 1 Davidson, *Prec. Conv.* 94, 95, 4th ed.

as leases for life or years, or gifts in tail. But if upon the sale of the fee simple, or other the vendor's whole estate in some land, it is stipulated that some exception or reservation shall be made, the same must of course be clearly defined in the deed of conveyance (*p*); for if all mention thereof be omitted, the deed will take effect at law according to its terms, and the vendor's only remedy will be an action for rectification of the conveyance (*q*).

Limitation of
the pur-
chaser's
estate.

The reader may be reminded that, although a contract for the sale of land, without defining the estate to be sold therein, is intended to mean a sale of the freehold in fee (*r*), this rule has no application to a conveyance on sale, in which the estate to be taken by the purchaser must be duly limited or marked out, either by the use of the words necessary to convey the fee at common law, or by the exact expressions mentioned in the 51st section of the Conveyancing Act, 1881 (*s*). If, therefore, an estate in fee simple were sold, the land must be conveyed either to the purchaser and his heirs or to him in fee simple, and no other words will suffice to effect this or (excepting the words proper to confer an estate tail) will avail to convey a greater estate than for the grantee's life (*t*). And it must not be forgotten that where the land sold is to be conveyed to a grantee to uses, it is equally necessary to limit to him an estate in fee simple in express and proper terms, otherwise he

(*p*) See 1 Davidson, *Proc. Conv.* 95—98, 4th ed., also showing the difference between an exception and a reservation.

(*q*) Above, pp. 640, 641.

(*r*) Above, p. 41.

(*s*) Stat. 44 & 45 Vict. c. 11.

(*t*) *Re Ethel and Mitchell and Butler's Contract*, 1901, 1 Ch. 945, where the limitation was to the grantee *in fee*; Wms. *Real Prop.* 207, 21st ed. It may be noted that it is sufficient if the proper

words of limitation be contained in the *habendum* only of a deed, as where A. grants to B. All that farm called Blackacre To Hold the same unto and to the use of B. and his heirs, or in fee simple; see *Jenkins v. Young*, Cro. Car. 230; *S. C.*, nom. *Meredith v. Joans*, Cro. Car. 244; *Orme's Case*, L. R. 8 C. P. 281, 295—298, 300; *Spencer v. Registrar of Titles*, 1906, A. C. 503; *Williams on Settlements*, 4—7.

takes an estate for his own life only in the land conveyed, with the consequence that the same legal estate and no more will pass under the Statute of Uses (*u*) to the person or persons to whose use it is expressed that he shall hold the land (*x*). But if the purchaser should, through a mistake of this kind, acquire by the conveyance a less estate at law than he was entitled under the contract to have assured to him, he will nevertheless be entitled in equity to such an estate as he actually purchased in the land, and will be entitled to have the conveyance rectified accordingly (*y*). This consideration has an important bearing on cases where an equitable estate in lands is limited in a deed by words which would be insufficient to convey the fee if the estate were legal, but indicate an intention to pass the entire equitable estate. It is settled that equity follows the law to this extent, that a grant by deed of an equitable estate in lands to the grantee simply, without any words of limitation *or any other words indicating an intention to pass the fee*, will confer an estate for the grantee's life only (*z*). But it is otherwise if the deed show an intention to transfer the grantor's whole equitable interest in the land (*a*). Thus, if A. agree with B. to buy the lands of which C. is seised in fee on trust for B. in fee, or to buy B.'s equity of redemption in the lands comprised in B.'s mortgage to D., and B. convey these lands to A. by a deed, in which the nature of the agreement between the parties is by recital or otherwise

Limitation by deed of equitable estates in land.

(*u*) Stat. 27 Hen. VIII. c. 10.

(*x*) Above, p. 172.

(*y*) *Re Ethel and Mitchell and Butler's Contract*, 1901, 1 Ch. 945, 948; below, Chap. XIII. § 2.

(*z*) See *Re Whiston's Settlement*, 1894, 1 Ch. 661, and the cases there cited: *Re Isaac*, 1901, 2 Ch. 752; Farwell, L. J., *Re Thorsby's Settlement*, 1910, 2 Ch. 181, 188, 189.

(*a*) See Shep. Touch. (Preston's

ed.) 106; Preston on Estates, ii. 64-66; Hayes on Conveyancing, 91, 92, 5th ed.; Lewin on Trusts, 95, 6th ed.; 117, 10th ed.; Wms. Real Prop. 165, 13th ed., 184, 185, 21st ed.; *Re Tringham's Trusts*, 1904, 2 Ch. 247; *Re Isaac*, ib. 752, 764; *Re Oliver's Settlement*, 1905, 1 Ch. 491; Farwell, L. J., *Re Thorsby's Settlement*, 1910, 2 Ch. 181, 189.

sufficiently shown and the payment of the purchase money is stated as the consideration, but which contains no words or no correct technical words of limitation of the fee simple to A., it is submitted that A. will none the less be entitled to the entire equitable estate in the lands. But, of course, it would be proper in such a case for A. to take a conveyance to himself and his heirs or in fee simple.

Vendor of
land bound
to give the
usual cove-
nants for title.

Every vendor of land, besides conveying the land sold to the purchaser, is bound, unless it appear from the contract that he was selling as a trustee or mortgagee (*b*), to enter into the usual qualified covenants for title. That is to say, he must covenant with the purchaser that he has power to convey the land as expressed in the conveyance, that the premises shall be quietly enjoyed and that the same are free from any incumbrance, and also, if the property sold were leasehold, that the lease is valid, the rent has been paid and the covenants performed: but all these covenants are limited to indemnifying the purchaser against disturbance by reason only of some act, omission or sufferance of the vendor himself, or of any of his predecessors in title subsequent to the last sale of the land or the last conveyance thereof for other valuable consideration whereon proper covenants for title were given (*c*), or of any persons claiming under him or them. So that if the vendor purchased the land himself, he will covenant against disturbance by reason only of his own acts or those of persons claiming under him. And the vendor must also covenant for further

(*b*) See *Worley v. Frampton*, 5 Hare, 560; Sug. V. & P. 69, 575; 1 Dart, V. & P. 550, 5th ed.; 622, 6th ed.; 573, 7th ed.; Wms. Real Prop. 449, 13th ed.; Davidson, Prec. Conv. vol. ii.

pt. i. 191, 261, n. (*n*), 296, n., 4th ed.; above, p. 76.

(*c*) See Sug. V. & P. 574; Davidson, Prec. Conv. 192, 261, n. (*o*), 4th ed.; 1 Dart, V. & P. 545, 5th ed.; 616, 617, 6th ed.; 568, 569, 7th ed.

assurance by himself or any one claiming under or in trust for him or any such of his predecessors in title as aforesaid (*d*). And although, as we have seen (*e*), a contract to sell land is an absolute undertaking, express or implied, to sell the fee simple or other estate specified, *free from incumbrances*, it is settled that, in the absence of express stipulation to the contrary, a vendor of land is not bound to give, in the conveyance of the land, any manner of warranty of title other than is afforded by these qualified covenants (*f*). And no other warranty of title (*g*) is implied on a sale of land made by one, who assumes to deal therewith as owner, and completed by conveyance and payment of the purchase money (*h*). Indeed, under the present law, no warranty of or covenant for title is implied by the mere conveyance, on sale or otherwise, of any land (*i*); except only in the case of a demise for a term of years (*k*), and in certain cases of statutory conveyance where the word *grant* by force of some Act of Parliament implies covenants for title (*l*). But, as we have seen, on an executory agreement to sell land the vendor is bound to show a good

No warranty of title now implied, as a rule, by the conveyance of land.

(*d*) *Browning v. Wright*, 2 B. & P. 13, 22; *Church v. Brown*, 15 Ves. 258, 263; *Blakesley v. Whieldon*, 1 Hare, 176, 181; Sug. V. & P. 574; 1 Dart, V. & P. 544, 545, 549, 5th ed.; 615—617, 621, 6th ed.; 567—569, 572. 7th ed.; Davidson, *Prec. Conv.* vol. i. 118, 203, n. (*b*); vol. ii. pt. i. 191, 205, 214, 215, 4th ed.; Wms. *Real Prop.* 448, 13th ed.; 607, 21st ed.

(*e*) Above, p. 41.

(*f*) See note (*d*), above. For this reason, if the conveyance as prepared on the purchaser's behalf purport to assure the land to be held by him "free from incumbrances," the vendor should strike out these words, as they might import an unrestricted warranty at common law that the lands were free from incum-

brances: see *Egpte. Stanford*, 17 Q. B. D. 259, 271.

(*g*) *E.g.*, no such warranty of title as is implied by the modern law on the sale of goods: see Benjamin on Sales, 511—523, 2nd ed.; Wms. *Pers. Prop.* 547, 16th ed.

(*h*) *Clare v. Lamb*, L. R. 10 C. P. 334.

(*i*) Co. Litt. 381a and note (1); stat. 8 & 9 Vict. c. 106, s. 4; *Clare v. Lamb*, *ubi sup.*; *Debenham v. Sawbridge*, 1901, 2 Ch. 98, 100.

(*k*) See Wms. *Real Prop.* 611, 612, 21st ed.; *Bradd-Scott v. Daniell*, 1902, 2 K. B. 351; *Jones v. Lavington*, 1903, 1 K. B. 253; *Mackham v. Paget*, 1908, 1 Ch. 697.

(*l*) See Wms. *Real Prop.* 610, 21st ed.

title (*m*); and if one agree to buy land and be let into possession on payment of the purchase money and the vendor's title prove defective before the execution of a conveyance, the purchaser can recover the price paid as upon a total failure of consideration, for the contract was not then completed (*n*). And this appears to be the case, notwithstanding that the title had been accepted (*o*); unless the purchaser had expressly agreed to accept such a title as exposed him to the risk attendant on the defect and the title contracted for had been duly shown to him (*p*). If, moreover, one induce another to buy land by untruthfully representing himself to be the freeholder in fee or absolute owner thereof, the purchaser will be entitled to relief on the ground of the misrepresentation and according as it were innocent (*q*) or fraudulent (*r*); the difference being that either an innocent or a fraudulent misrepresentation of this kind will be a good ground for rescinding or avoiding the specific performance of the contract while it remains uncompleted, but only a fraudulent misrepresentation will give rise to an action of deceit, or to a claim to set aside the conveyance after completion.

False representation by vendor that he is the owner of the land sold.

Sale by trustee as such.

If the vendor sold as a trustee, he cannot be required to give the usual vendor's covenants for title, but can only be called upon to covenant that he has done no

(*m*) Above, pp. 32, 94 *sq.*

(*n*) *Johnson v. Johnson*, 3 B. & P. 162.

(*o*) See *S. C.*; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666; and above, pp. 179—181.

(*p*) See above, pp. 202—207.

(*q*) *Bree v. Holbeck*, 2 Doug. 654; *Wilde v. Gibson*, 1 H. L. C. 605, 633; *Selborne, C.*, *Brownlie v. Campbell*, 5 App. Cas. 925, 935—938; *Jolliffe v. Baker*, 11 Q. B. D. 255; *Derry v. Peek*, 14 App. Cas. 337; *Onward Building*

Society v. Smithson, 1893, 1 Ch. 1, 12; *Dorbenham v. Sawbridge*, 1901, 2 Ch. 98; see also *Rudd v. Lascelles*, 1900, 1 Ch. 815, 818; below, Chap. XIV. § 1; XIX. § 5.

(*r*) *Edwards v. M'Leay*, G. Coop. 308, 2 Swanst. 287; *Hart v. Swaine*, 7 Ch. D. 42, as to which see *Brownlie v. Campbell* and *Jolliffe v. Baker*, *ubi sup.*; *Derry v. Peek*, 14 App. Cas. 337, 365, 366, 371—374; below, Chap. XIV. § 1; XIX. § 5.

act to incumber the property sold (s). But if a trustee enter into a contract to sell land, without disclosing his fiduciary character, the purchaser will, it is thought, be entitled to the same covenants as if the vendor were the beneficial owner (t). This should not be forgotten when it is desired to effect a sale by trustees without disclosing the trust. So a mortgagee selling as such under his power of sale is only bound to covenant that he has not incumbered (u), but would, it is thought, be liable to give the usual vendor's covenants as to title if he sold under an open contract. Where land held on a simple trust or in mortgage is sold by or by the direction of the *cestui-que-trust* or the mortgagor or other person entitled to the equity of redemption, he must enter into the vendor's covenants for title, and the trustee or mortgagee concurring in the sale is only bound to covenant against his own incumbrances. And on a sale by mortgagor and mortgagee, it is the invariable practice to insert or incorporate in the conveyance the usual qualified covenants for title by the mortgagor, notwithstanding that these appear to supersede and to deprive the purchaser of the benefit of the absolute covenants for title entered into by the mortgagor on the occasion of the mortgage (x). If land be sold by a trustee in bankruptcy professedly selling as such under the power of sale given to him by statute (y), he can only be required to covenant that he has done no act to incumber. It has, however, been the practice to require the bankrupt himself to concur in the conveyance and to covenant for title: but this cannot be insisted on, and the bankrupt's covenants are of little or no value (z). Where lands are

By mortgagee
as such.

By *cestui-que-
trust* or
mortgagor.

By trustee in
bankruptcy.

(s) Above, p. 652, n. (b).

(t) Above, p. 652.

(u) Davidson, *Proc. Conv.* vol. ii. pt. i. 296, n., 4th ed.

(x) Davidson, *Proc. Conv.* vol. ii. pt. i. 291, n., 293, n. b., 4th ed.; 1 Key & Elph. *Proc.*

Conv. 485, 4th ed.; 483, 8th ed.

(y) Stat. 16 & 17 Vict. c. 52, s. 35.

(z) Sug. V. & P. 575; 1 Dart, V. & P. 552, 5th ed.; 621, 6th ed.; 575, 7th ed.; Davidson, *Proc. Conv.* vol. ii. pt. i. 618

Sale under
power.

sold by or by the direction of one entitled to some estate therein, with the intention that they shall be conveyed under some power exercisable by himself or by others with his consent (such as the power of sale given to a tenant for life by the Settled Land Act, 1882 (*a*), or the power of sale usually limited before that Act to the trustees of real settlements to be exercisable with the tenant-for-life's consent), he is bound to enter into the usual covenants for title (*b*). But where such person is tenant for life only and his covenants for title extend to the acts, &c. of any of his predecessors in title (*c*), it is the regular practice to limit these covenants by a proviso saving him from liability, as regards the remainder or reversion expectant on his life estate, for any other acts or defaults than those of himself or his own heirs or persons claiming under or in trust for him or them (*d*). And it would probably be held, where the nature of the interest of a tenant for life so selling or consenting to a sale appears from the contract, that he is entitled to insist on this restriction of his liability. But it is thought that this is not the case where he has sold as absolute owner. Thus, if one so entitled sold by an open contract, which he proposed to carry out by a conveyance by himself under the Settled Land Act, 1882, or by trustees under a power of appointment exercisable with his consent (*e*), it is submitted that he would be bound to give vendor's covenants for title unrestricted by any such proviso. The case is analogous to a sale made by a trustee without disclosing his fiduciary character (*f*). If lands be vested in trustees

and n., 4th ed.; 1 Key & Elph. Prec. Conv. 533 and n., 4th ed.; 526 and n., 8th ed.

(*a*) Above, pp. 300 *sq.*

(*b*) *Re London Bridge Acts*, 13 Sim. 176, 179; *Poulett v. Hood*, L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract*, 53 L. J. Ch. 1104; Sug. V. & P. 575.

(*c*) Above, pp. 652, 653.

(*d*) 1 Dart, V. & P. 548, 5th ed.; 619, 620, 6th ed.; 571, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 261, n. (*e*), 262, 4th ed.; 1 Key & Elph. Prec. Conv. 453, n., 4th ed.; 449, n., 8th ed.

(*e*) Above, pp. 165, 282, 300 *sq.*

(*f*) Above, p. 655.

on a special trust for sale, and they sell as such trustees, their receipts being good discharges (*g*), it does not appear that the purchaser is in strict right entitled to require the persons beneficially interested in the purchase money to join in the conveyance or to covenant for title (*h*): but it has been the practice of conveyancers to insist, if such persons were absolutely entitled and *sui juris*, that they should give the usual vendor's covenants for title as regards their shares (*i*). It is, however, usual on sales by trustees to stipulate expressly that the concurrence of the beneficiaries shall not be required and the purchaser shall be entitled to no other covenant than the trustees' covenant against incumbrances (*k*). Where lands belonging to one absolutely are sold by order of the Court, he must enter into the same covenants for title as if he himself had sold them; but where on such a sale the legal estate is in trustees and a good title to the equitable interest is given by virtue of the order for sale (*l*), the purchaser cannot require the concurrence in the conveyance of the persons beneficially entitled, or oblige them to covenant for title (*m*).

Sale by order
of the Court.

The present practice is to incorporate the requisite covenants for title or covenant against incumbrances (*n*) in conveyances on sale by using the expressions which cause such covenants to be "deemed to be included and to be implied" therein by virtue of the Conveyancing

The statutory
covenants for
title.

(*g*) Above, p. 288.

(*h*) See *Cottrell v. Cottrell*, L. R. 2 Eq. 330; above, p. 655; and next note.

(*i*) Sug. V. & P. 574; 1 Dart, V. & P. 545, 546, 5th ed.; 617, 618, 6th ed.; 568, 569, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 275, n., 4th ed.; Wms. Real Prop. 449, 453th ed.; 609, 21st ed.

(*k*) 1 Davidson, Prec. Conv. 613, 4th ed.; 1 Key & Elph.

Prec. Conv. 264, n., 4th ed.; 252, n., 8th ed.; above, p. 76.

(*l*) Above, p. 472.

(*m*) Sug. V. & P. 574; *Cottrell v. Cottrell*, L. R. 2 Eq. 330; 1 Dart, V. & P. 545, 5th ed.; 617, 6th ed.; 568, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 270—275 and notes, 4th ed. It is usual, however, so to stipulate: 1 Davidson, Prec. Conv. 661, 4th ed.; 593, 5th ed.

(*n*) Above, pp. 652—655.

Act of 1881. By this Act (*o*), in a conveyance (*p*) for valuable consideration, other than a mortgage (*q*), there are implied on the part of anyone, who conveys and is expressed to convey as beneficial owner, as regards the property expressed to be conveyed by him, and with the person or persons to whom the conveyance is made, covenants for right to convey, quiet enjoyment, freedom from incumbrances and further assurance, and in the case of leaseholds, for validity of the lease; all limited to the acts, omissions and sufferances of the person who so conveys, anyone conveying by his direction and anyone through whom he derives title otherwise than by purchase for value (not here including a conveyance in consideration of marriage), and persons claiming under him or them (*r*). And the like covenants are implied in a similar conveyance, in which it is expressed that one conveys by direction of another directing as beneficial owner, on the part of the person so directing (*s*). And in any conveyance there is implied a covenant against

(*o*) Stat. 44 & 45 Vict. c. 41, s. 7 (1) (a), (b). This section applies only to conveyances made after the year 1881: sect. 7 (8).

(*p*) In this section "conveyance" includes a deed conferring the right to admittance to copyhold or customary land; but does not include any other customary assurance, or a demise by way of lease at a rent; sect. 7 (5). "Conveyance" in the Act is confined to assurances made by deed on some dealing with or for property; sect. 2 (v).

(*q*) In a conveyance by way of mortgage, absolute covenants for title are implied on the part of any one, who conveys and is expressed to convey as beneficial owner: sect. 7 (1) (c), (d). And in a conveyance by way of settlement there is implied on the part of any one who conveys and is expressed to convey as settlor a covenant for further assurance limited to himself and every per-

son deriving title under him subsequently to that conveyance: sect. 7 (1) (e).

(*r*) Due exceptions are made with regard to any estates, interests, or incumbrances, subject whereto the conveyance is *expressly* made, and the acts, &c. of persons claiming in respect thereof; see above, p. 644.

(*s*) Sect. 7 (2). And by sect. 7 (3), where a wife conveys and is expressed to convey as beneficial owner and her husband also conveys and is expressed to convey as beneficial owner, there are implied, besides the covenants implied as above mentioned by the use of these expressions, the same covenants as if the wife conveyed by the direction of the husband directing as beneficial owner, and also covenants by the husband in the same terms as the covenants implied on the part of the wife: see Wms. Conv. Stat. 87—91.

incumbrances by anyone who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or under an order of the Court, such covenant extending to the conveying party's own acts only (*t*). But no covenant is implied in any conveyance by virtue of this Act where it is not expressed that some person conveys in one of the characters particularly mentioned in the Act; for instance, as beneficial owner or as trustee (*u*). The covenants implied by virtue of this Act may be varied or extended by deed (*x*). They may therefore, it is considered, be limited in any manner which will not altogether destroy the covenantor's personal liability. A proviso destroying altogether a covenantor's personal liability on the covenant is held to be repugnant and void (*y*). An instance of the limitation of the statutory covenants for title occurs in the proviso usually inserted in conveyances where the party covenanting for title is a tenant for life only (*z*). The benefit of a covenant implied by virtue of this Act shall be annexed and incident to and go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested (*a*). This is analogous to the law laid down with respect to express covenants for title. These run with the land; that is to say, they are enforceable by every one, who takes the covenantee's estate therein (*b*), or any part thereof (*c*). But they are not enforceable

(*t*) Sect. 7 (1) (f).

(*u*) Sect. 7 (4).

(*x*) Sect. 7 (7).

(*y*) *Williams v. Hathaway*, 6 Ch. D. 544, 546.

(*z*) Above, p. 636.

(*a*) Sect. 7 (6).

(*b*) Co. Litt. 314 b, 385 a; *Middlemore v. Gaudale*, Cro. Car.

503; *Campbell v. Lewis*, 3 B. & A. 392; Sug. V. & P. 576 sq.

(*c*) *Farwell, J., Rogers v. Hosegood*, 1900, 2 Ch. 388, 396; 9 Jarm. Conv. by Sweet, 366, 404; 2 Dart, V. & P. 779, 5th ed.; *Tayman v. Pickard*, 2 B. & A. 105.

by one who acquires the land, but does not take the covenantee's estate therein. Thus if A. conveyed land to B. and his heirs to such uses as C. should appoint and in default of appointment to the use of C. and his heirs and covenanted with C. for title, and C. afterwards *appointed* the land to the use of D. and his heirs, D. could not sue on the covenants for title, for he took an estate which defeated C.'s estate in the land (*d*). Although if C. had conveyed to D. his *estate* in the land, D. could have sued on the covenants for title. D. could also have sued on the covenants, if they had been made (as they should have been) with B., the grantee to uses; because then D. would, by virtue of the Statute of Uses (*e*), have taken the covenantee's estate in the land; and this would be the case, whether he had taken by appointment or grant from C. (*f*). Where the statutory covenants for title are employed, the implied covenantee is the person to whom the conveyance is made (*g*). This, in cases where the conveyance is made to uses intended to be executed by the Statute of Uses (*e*), is the grantee to uses; so that if the limitations of the conveyance include a power of appointment, an appointee thereunder will take the implied covenantee's estate and so be enabled to sue upon the covenants for title. But it appears equally true in principle of the statutory as of the express covenants for title that one cannot sue thereon, as assignee of the land to which they relate, unless he take the implied covenantee's estate therein.

Covenants for title on sale of an equitable estate.

If covenants for title were given upon the sale of an equitable estate, as of an equity of redemption, an assignee of the purchaser's estate could not maintain an

(*d*) *Roach v. Wadham*, 6 East, 289; Sug. V. & P. 578—580.

(*e*) Stat. 27 Hen. VIII. c. 10.

(*f*) Sug. V. & P. 578; *Spoor*

v. Green, L. R. 9 Ex. 99, 105, 113.

(*g*) Above, p. 658.

action at law upon the covenants in his own name, for there being no legal estate with which the covenant could run, he was regarded in law as a stranger to the covenant (*h*). It appears however that he might maintain an action at law in the name of the original covenantee, or his representatives, who would in equity be bound to allow his or their name to be used for the purpose. For in equity the benefit of the covenants for title would, in accordance with the manifest intention of the parties, run with the purchaser's estate in the land (*i*). But where the statutory covenants for title are given in the conveyance on sale of an equitable estate, it appears that an assignee of the purchaser's estate may well maintain an action at law in his own name upon the covenants, since the right of action thereon is by force of the above-mentioned provisions of the Conveyancing Act (*k*) annexed to the implied covenantee's estate or interest in the land conveyed to him; and it is thought that the right of action on the covenants is effectually so annexed to the covenantee's estate, whether his interest be legal or equitable.

If on a conveyance of land covenants for title, express or statutory, be obtained by fraud, the covenantor may well plead the fraud, in avoidance of the contract, in any action brought against him on the covenants by the original covenantee. But if the covenantee assign over his estate in the land to a purchaser for value without notice of the fraud, the assignee will be entitled, as such, to enforce the covenants; and the covenantor will no longer be enabled to set up the plea of fraud (*l*).

Covenants for
title obtained
by fraud.

h) Sug. V. & P. 581; 9 Jarm. Conv. by Sweet, 366; *Onward Building Society v. Smithson*, 1893, 1 Ch. 1, 12.

i) See *Spencer v. Bonus*, 1 Ves. 370; *Riddell v. Riddell*, 7 Sim. 529, 533, 535; *Roberts v. Hose-*

good, 1900, 2 Ch. 388, 404; Sug. V. & P. 592, 593.

k) Stat. 44 & 45 Vict. c. 41, s. 7 (6); above, p. 659.

l) *David v. Sabin*, 1893, 1 Ch. 523, overruling the dictum to the contrary in *Onward Building*

Purchaser
may take
either express
or the statu-
tory covenants
for title.

It seems to lie in the purchaser's option whether the covenants for title, which he is entitled to demand, shall be given by express words in the old form or by incorporation in the conveyance of the statutory covenants; for the purchaser is in general the arbiter of the form of the conveyance (*m*). But, as we have seen (*n*), the practice is to take the statutory covenants. If, however, the statutory covenants implied by the vendor's conveyance as beneficial owner would impose upon him any more extensive covenant than the contract obliges him to give, he will of course be entitled to have the operation of the statute duly restricted (*o*). Thus it has been already mentioned that a tenant for life not bound to covenant against the acts of the remaindermen or reversioners may so limit his liability (*p*). Again, we have seen (*q*) that a vendor is bound to covenant for title against his own acts and the acts of all his predecessors in title subsequent to the last sale of the land or other dealing therewith for value whereon proper covenants for title were given. But the statutory covenants are against the conveying party's own acts and the acts of all persons through whom he derives title otherwise than by purchase for value not including the consideration of marriage (*r*). If, therefore, the vendor derive title under a marriage settlement whereon proper covenants for title were given (*s*), it appears that

Society v. Smithson, 1893, 1 Ch. 1, 13; see below, Chap. XIX. § 5.

(*m*) Above, pp. 617, 622--624. The same principle appears applicable in determining whether any other rights, to which the purchaser is entitled, shall be assured to him in express terms or by some statutory form; *e.g.*, whether express general words shall be inserted, or recourse had to the statute; above, pp. 637, 638.

(*n*) Above, p. 658.

(*o*) Above, p. 640.

(*p*) Above, p. 656.

(*q*) Above, p. 652.

(*r*) Above, p. 658.

(*s*) It was the practice before the year 1882 for the settlor in a marriage or family settlement to give covenants for title qualified in the same manner as upon a sale: Davidson, *Proc. Conv.* vol. iii. 59, 275, 634, 861, 1027, 1120, 3rd ed.; Williams on Settlements, 126, 226. But since the Conveyancing Act of 1881 took effect, settlors have in many cases given only the covenant for further assurance implied under that Act by their conveying as settlor: above, p. 658, n. (*r*);

in strict law he will not be bound to covenant for title against the acts of the settlor, and will be entitled to have the statutory covenants modified accordingly (*t*). In practice, however, vendors claiming under marriage settlements whereon proper covenants for title were given have frequently submitted to covenant against their settlors' acts (*u*).

On the sale of a legal estate in copyholds, the covenants for title must be given by a deed separate from the conveyance of the land, which will of course be by surrender and admittance (*x*); as the covenants cannot be entered on the court rolls. This may be accomplished by a deed either preceding or following the surrender. In the former case the deed takes the form of a covenant by the vendor to surrender the copyholds to the purchaser's use and the covenants for title are added; in the latter case the deed contains only the covenants for title. The latter course was formerly considered preferable, because it was doubted whether in the former case the covenants would run with the land, the covenantee having no legal interest therein previously to the surrender (*y*). It should be noted that the statutory covenants for title can only be incorporated in a deed conferring the right to admittance to copyhold land (*z*); so that if it be preferred to take the surrender before the covenants for title are entered into, they must be given by express words in the old form. As the right of action on the statutory

Covenants for title on sale of copyholds.

2 Key & Elph. Prec. Conv. 461, n., 562, 563, 704, 710, 4th ed.: 457, n., 553, 554, 671, 680, 8th ed.; Davidson's Concise Precedents, 511 and n., 521, 17th ed.
v Sug. V. & P. 574; 9 Jarm. Conv. by Sweet, 375; Davidson, Prec. Conv. vol. ii. pt. i. 192, 237, n., 243, n., 254, n., 261, n., 4th ed.

y See 1 Dart, V. & P. 545,

5th ed.: 616, 6th ed.: 568, 7th ed.

x Wms. Real Prop. 484 *sq.*, 21st ed.

y Above, pp. 659—661; *Reddell v. Reddell*, 7 Sim. 529; Davidson, Prec. Conv. vol. ii. pt. i. 205—207, 364, 367, 4th ed.

z Stat. 44 & 45 Vict. c. 41, s. 7 (5); above, p. 658, and n. *q*.

covenants for title is expressly given to every person in whom is vested the whole or any part of the estate or interest of the implied covenantee, and it appears immaterial whether that estate were legal or equitable (*a*), there seems to be no doubt that, where such covenants are given by a deed of covenant to surrender copyholds upon a sale thereof, the purchaser's assigns will be enabled to sue at law upon the covenants. For this reason the usual course now is for the purchaser to take the statutory covenants for title upon the sale of copyholds, incorporating them in a deed of covenant to surrender the land to his use (*b*). It must be borne in mind, however, on the purchase of copyholds, that the purchase money should not be paid until the actual surrender of the land sold; for a surrender only can confer on the purchaser an indefeasible right to admittance (*c*).

Payment of
price on sale
of copyholds.

Where the
land sold is to
be conveyed
subject to any
incumbrance.

As has been already mentioned (*d*), where land is sold subject to some definite incumbrance, legal or equitable, whether it be a mortgage, charge, lease, easement, *profit à prendre*, restrictive covenant or other liability, it is proper to express in the conveyance that the land is conveyed subject to the incumbrance. And the vendor must be particularly careful to see that this is done, where the incumbrance was created by himself or some one, against whose acts he is bound to covenant for title (*e*), and it is proposed to incorporate the statutory covenants for title. For these include covenants for right to convey, quiet enjoyment, and freedom from incumbrance, subject only to estates or interests subject whereto the conveyance was expressly made (*f*). So that in such cases unless

(*a*) Above, p. 661.

(*b*) 1 Key & Elph. Prec. Conv. 475 and n., 4th ed.; 474 and n., 8th ed.

(*c*) See Davidson, Prec. Conv. vol. ii. pt. i. p. 206, 4th ed.;

Wms. Real Prop. 485, 486, 21st ed.

(*d*) Above, p. 643.

(*e*) Above, pp. 652, 662.

(*f*) See stat. 44 & 45 Vict. c. 41, s. 7 (1); above, pp. 652, 658, n. (*r*).

the incumbrance, subject to which the land was sold, be expressly mentioned, the statutory covenants for title will in terms extend to guarantee indemnity against it; although the conveyance will only pass the vendor's actual interest in the land (*g*). The incumbrance diminishing the estate granted to the purchaser must therefore be exactly specified in the conveyance. If this were inadvertently omitted, the vendor would have no remedy against an action on the covenants but to claim rectification of the conveyance (*h*). On the other hand, if land, to which the vendor's title is defective, be sold, or accepted by the purchaser, with the stipulation that the vendor shall by his covenants for title guarantee indemnity against the risk of the defect, and the defect appear on the face of the conveyance, it must be plainly shown, where the statutory covenants for title are applicable and are relied on, that they are intended to cover the defect; otherwise it might be contended that the defect, being an incumbrance subject to which the conveyance was expressly made, did not come within the terms of the covenants. Of course, if in this or any other case the usual qualified covenants for title do not cover defects or possible defects of title, against which the vendor is by the contract of sale bound to guarantee indemnity, the statutory covenants for title must be modified accordingly or else, which is the better plan, the required covenants for title must be given in express terms duly showing the intention of the parties (*i*). Where covenants for title are particularly intended to guard against a known defect of title, which is not necessarily apparent, it is better that they should be contained in a deed separate from the conveyance; as

Covenants for title intended to cover an apparent defect.

g) Above, p. 645.

h) Above, p. 644.

i) See *Pope v. Mafumel Road Co.*, 1894, 1 Ch. 11, 20; *May v.*

Platt, 1900, 1 Ch. 616; 2 Dart, V. & P. 786, 5th ed.; 886, 887, 6th ed.; 794, 795, 7th ed.

it would not generally be desirable to show the defect on the face of the conveyance (*k*). In such case express covenants must be given, as the statutory covenants can only be incorporated in a deed of conveyance: but the statutory covenants might be given in the conveyance to prevent attention being attracted by their absence, and it might be provided in the separate deed that the covenants thereby given were intended to be additional.

Purchaser agreeing to observance of restrictions on the use of the land bought must enter into an absolute covenant to that effect.

In certain circumstances the vendor can require the purchaser to enter into some covenant with him by the deed of conveyance. Thus, if the contract for sale provide for the observance of certain restrictions on the use of the land sold, the purchaser is bound, on completion, to enter into a covenant to observe the restrictions (*l*); and in the absence of stipulation to the contrary, this covenant must be absolute, and the purchaser cannot insist that his liability thereunder shall be limited in any way, as by a proviso that he shall be released from liability if he re-sell the land and procure the new purchaser to enter into a similar covenant (*m*). If the parties intend that the benefit of any such restrictive covenant shall run with some particular land retained by the vendor, he should be careful that the covenant is so expressed that no doubt can arise as to the persons who will be entitled to enforce the covenant. It is, as we have seen (*n*), a question to be decided on consideration of all the circumstances and conditions of the sale whether the intention of the contracting parties was that the benefit of such a covenant should run with some particular land belonging to the vendor, or whether this benefit was meant to be confined

(*k*) Sug. V. & P. 573; Davidson, Prec. Conv. vol. ii. pt. i. pp. 379, n., 381, 4th ed.

(*l*) See above, pp. 493, 648.

(*m*) See *Pollock v. Rabbits*, 21

Ch. D. 466, decided on an express condition; but it is thought that the stipulation implied by law is the same.

(*n*) Above, pp. 491—493, 648.

to the vendor himself, his personal representatives, and his assigns of the benefit of the covenant. The purchaser can of course only be called upon to covenant as intended by the contract. If the contract do not in effect provide that the benefit of the covenant shall run with some particular land of the vendor's, the purchaser cannot be obliged to covenant in such a manner that the vendor's heirs and assigns of that land will be entitled as such, and not merely as assignees from the vendor of the benefit of the covenant, to enforce the covenant (*o*).

When the vendor is bound under any covenant or contract to pay any money or do or observe any other act or thing in respect of the land sold or as the condition of retaining his interest therein, and the land is sold to be held by the purchaser on the same terms as the vendor held it, but the vendor will remain personally liable for any future breach of the covenant or contract, which may occur after the sale and conveyance of the land, the purchaser is bound on completion to enter into a covenant with the vendor promising to observe all the conditions on which it is intended that he shall hold the land and to indemnify the vendor against all liability in respect of any future breach of these conditions; and it is not necessary for the vendor to stipulate expressly in the contract for sale that the purchaser shall enter into such a covenant (*p*). For example, on the sale of leaseholds, which are subject to the payment of rent and the performance of onerous covenants, the purchaser must, if the vendor will remain under any liability in

In what cases the purchaser is bound to indemnify the vendor.

On sale of leaseholds.

o See *Reynolds v. Carlshaw*, 9 Ch. D. 125, 129, 11 Ch. D. 866; *Spicer v. Martin*, 14 App. Cas. 12, 24; *Rogers v. Hoesgood*, 1900, 2 Ch. 388, 396, 403—408.

p See *Pemberton v. Mathers*, 1 Bro. C. C. 52, 54; *Waring v. Ward*, 7 Ves. 332, 357; *Staines v.*

Morris, 1 V. & B. 8; *Wilkins v. Fry*, 1 Mer. 244, 263—266; *Moorhouse v. Underwood*, 1 De G. & S. 708; Sug. V. & P. 37, 38, 198; 1 Dart, V. & P. 557 *sq.*, 5th ed.; 628 *sq.*, 6th ed.; 579 *sq.*, 7th ed.; *Re Pools and Clarke's Contract*, 1904, 2 Ch. 173.

respect of the rent and covenants, covenant in the deed of conveyance thenceforth to pay the rent and perform the covenants and to indemnify the vendor against all liability by reason of any future omission to pay the rent or keep the covenants. The purchaser must therefore give this indemnity, where the vendor is the original lessee, or an assignee who has entered into a similar covenant on the assignment to himself, or the executor or administrator of such lessee or assignee (*q*). But in all such cases the sole object of the covenants so to be given by the purchaser is to secure the vendor's indemnity against any future breach of the conditions on which the land sold is held; and (except on the purchase of leaseholds) the purchaser is entitled to require that his covenant to observe these conditions shall be so expressed as not to impose on him any greater liability than this (*r*). On the sale of leaseholds the vendor can oblige the purchaser to covenant in the above-mentioned form, which has been established by long conveyancing practice: but such covenants will be construed as having been given by way of indemnity only, and not so as to confer on the vendor any further or other right to insist on the observance of the covenants in the lease than is necessary for the purposes of his own indemnity (*s*). If the vendor of leaseholds will not remain liable, after the assignment of the leaseholds to the purchaser, for any future failure to pay the rent or keep the covenants, as where he is the original lessee's trustee in bankruptcy or is an assignee of the lease who did *not* covenant to indemnify his assignor generally against the rent and covenants, he cannot require the purchaser to covenant to indemnify him (*t*). Where on a sale of

q See previous note. *Harris v. Boots, &c. Ltd.*, 1904, 2 Ch. 376, 382; above, p. 80.

r) *Re Foote and Clarke's Contract*, 1904, 2 Ch. 173.

(*s*) *Harris v. Boots, &c. Ltd.*, 1904, 2 Ch. 376.

(*t*) See *Watkins v. Fry*, 1 Mer. 244, 263—266; *Sug. V. & P.* 37, 38; 1 *Dart, V. & P.* 558, 5th ed.:

leaseholds the vendor is bound to pay the rent and perform the covenants in the lease up to the proper time for completion, as is the case under an open contract (*u*), it is thought that the purchaser cannot be required to enter into such a covenant as would extend to indemnify the vendor against past breaches of covenant (*x*). And it is submitted that in such case the purchaser cannot safely enter into a covenant of indemnity in the common form, which has been hitherto usual (*y*); for this, it seems, might be held to oblige him to indemnify the vendor against past breaches of covenant (*z*): but he should insist on his liability being expressly limited to indemnity against future omission to pay the rent and keep the covenants. If, however, the purchaser bought with notice of some breach of covenant and agreed to take the property subject to the breach, then, it is thought, his covenant to indemnify the vendor ought to include indemnity against the con-

630, 6th ed.: 581. 7th ed.: Davidson, *Prec. Conv.* vol. ii. pt. i. 217, 4th ed. Note that the assignee's liability independent of express contract to indemnify the original lessee (as to which see *Burnett v. Lynch*, 5 B. & C. 589; *Moule v. Garrett*, L. R. 5 Ex. 132, 7 Ex. 101) extends only to omission to pay the rent or keep the covenants during his own tenancy, and not to any such omission occurring after he has assigned over: *Sug. V. & P.* 38.

(*u*) Above, pp. 350 *sq.*

(*x*) This is further apparent from the fact that the covenants for title, which the vendor is bound to give, include a covenant that the rent has been paid and the covenants performed; see above, p. 652.

(*y*) Davidson, *Prec. Conv.* vol. ii. pt. i. 419, 4th ed.; 1 Key & Elph. *Prec. Conv.* 457, 8th ed.

(*z*) See *Goosh v. Clutterbuck*, 1899, 2 Q. B. 148, where the

covenant was not exactly in the common form: but the construction placed upon it certainly throws doubt upon the construction of the common form, which is not expressed with unmistakable accuracy. Some of the reasons given for the decision in this case appear questionable: but it may be supported on the ground that the breach of the covenant to repair was a continuing breach and the assignee covenanting to perform the covenants as from the date of the assignment came under an immediate duty to perform the covenant to repair, and he could not discharge this duty without remedying the whole breach of the covenant. Thus his failure to remedy the continuing breach, which occurred after the assignment, made him indirectly liable to indemnify the vendor against a breach of covenant which had occurred before it.

sequences of that breach. For example, where buildings held under a repairing lease are out of repair and are sold to a purchaser, who has notice of the actual condition of the premises, on the terms that he shall take them as they are and the vendor shall not be obliged to put them in repair before completion, the purchaser must, it is submitted, covenant to indemnify the vendor against all liability for the existing breach of the covenant to repair (*a*) as well as against any future omission to pay the rent or keep the covenants (*b*).

Indemnity on
sale of land
subject to
restrictive
covenants.

When freehold or copyhold land affected by restrictive covenants is sold subject to the covenants, the question of the purchaser's liability to covenant to indemnify the vendor depends on the principle above stated (*c*), the same as prevails in the case of the leaseholds. If the vendor will remain liable, after the conveyance, under any covenant or contract previously made by him, for the future omission to observe the restrictions, the purchaser must covenant to indemnify him; otherwise not. And this principle is properly applicable, whether the vendor or the purchaser seek to enforce the contract (*d*).

(*a*) The judgments given in *Re Highbett and Bird's Contract*, 1903, 1 Ch. 287, are opposed to this view: but it is submitted that those judgments were delivered under a mistaken apprehension of the law: see above, p. 354.

(*b*) Apparently a covenant of indemnity in the common form would effect this object, where the breach is continuing, for the reason given in the previous note. But if the breach were not continuing the common form could not be relied on. Where the vendor covenants for title in the usual way, it seems impossible to construe the common form of purchaser's covenant as extending to past breaches of covenant.

(*c*) Above, p. 667.

(*d*) *Re Poole and Clarke's Contract*, 1904, 2 Ch. 173. See *Morhay v. Inderwick*, 1 De G. & S. 708; *Lakey v. Higgs*, 1 Jur. N. S. 200, where there are *dicta* leading to the conclusion that, where land is expressly sold as being subject to restrictive covenants, but without an express stipulation that the purchaser shall observe the covenants, the purchaser cannot enforce the specific performance of the contract without entering into a covenant with the vendor to observe the restrictions; but if specific performance be sought by the vendor, the purchaser cannot be obliged to enter into such a covenant: see Sug. V. & P. 38. But it appears that Mr. Dart's criticism of these *dicta* (1 Dart,

Thus the vendor will be entitled to be indemnified where he was a party to the contract, which originally imposed the restrictions, or where he bought from one liable to observe the restrictions and covenanted with him to observe the restrictions and to indemnify him against all future breaches thereof. But if the vendor were no party to the contract creating the restrictions and acquired the land subject to the restrictions without himself contracting to observe them or to indemnify his grantor against their non-observance (*e*), there is no reason for calling upon the purchaser to indemnify him. These results follow, when land is sold subject to restrictive covenants, although the contract for sale do not expressly provide for any covenant being made by the purchaser: but the purchaser, where he can be required so to covenant, is entitled to have his own covenant to observe the restrictions limited in express terms to securing the vendor's indemnity against future breaches of the restrictive covenants (*f*). It is however common for a vendor who is selling land subject to restrictive covenants, and will remain liable for the failure to observe them, to stipulate expressly that the purchaser shall covenant to observe the restrictions and indemnify him against any future omission to observe them; and if this be done, the purchaser must of course covenant in the terms stipulated for. Where lands were sold subject to a covenant not to erect thereon any buildings other than those of a particular kind and also subject to "proper provisions for securing the due observance and performance" of the covenant, it was held that the vendor was entitled to have inserted in the conveyance a power of re-entry,

V. & P. 559—561, 5th ed.; 631—633, 6th ed.) was correct: and that the distinction so suggested is unsound: and it is now established that the true principle is that stated in the text: *Re Poole*

and *Clarke's Contract*, ubi sup.

^c See above, p. 667.

^f *Re Poole and Clarke's Contract*, 1904, 2 Ch. 173; above, p. 668.

exercisable within the period of certain existing lives and twenty-one years after, in case of any breach of the covenant, for the purpose of pulling down any buildings erected in breach of the covenant, and holding the lands until reimbursed all expenses of so doing; but was not entitled to have a term of years or a rent-charge limited to a trustee for the purpose of securing the performance of the covenant (*g*). This was so decided in consequence of the express stipulation for proper provisions for securing the performance of the covenant; and, without such stipulation, a vendor selling lands subject to restrictive covenants cannot insist on the insertion in the conveyance of any proviso for re-entry on breach of the covenant.

Indemnity on sale of land subject to a charge for which the vendor will remain liable.

So where land is sold subject to some charge, which the vendor will after conveyance remain personally liable to pay, the purchaser is bound to covenant to indemnify the vendor against all liability for its non-payment; as where a mortgagor sells the equity of redemption of the mortgaged land (*h*), or land is sold subject to a rent-charge which the vendor has, either on its original creation or on his own purchase of the land, covenanted to pay (*i*), or an estate in remainder liable to succession duty is sold (*k*).

Sale in consideration of a rent-charge.

Where land is sold in consideration of a rent-charge to issue thereout either for life or in fee, the vendor is entitled to require that the rent shall be secured to

(*g*) *Expte. Ralph*, De G. 219.

(*h*) *Waring v. Ward*, 7 Ves. 332, 337; *Bridgman v. Daw*, 40 W. R. 253; Sug. V. & P. 198; 1 Dart, V. & P. 557, 5th ed.; 629, 6th ed.; 579, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 453 and n. (*d*), 4th ed. The purchaser is liable in equity to indemnify the vendor without such covenant; *Waring v.*

Ward, ubi sup.; *Re Law Courts Chambers Co.*, 61 L. T. 669, 671.

(*i*) 1 Dart, V. & P. 559, 5th ed.; 631, 6th ed.; 582, 7th ed.; see above, p. 435.

(*k*) *Re Repington*, 1904, 1 Ch. 811, 814; Dart, V. & P. 557, 593, 5th ed.; 629, 668, 6th ed.; 580, 1234, 7th ed.; see above, p. 407.

him, not only by charging the same on the land sold, but also by the purchaser's personal covenant for payment (*l*). The vendor is also entitled to have an express power of distress limited to him, that being of the essence of a rent-charge (*m*). It is questionable, however, whether he is entitled, in the absence of express stipulation, to have the rent-charge further secured by a power in default of payment to re-enter and hold the land until the arrears of the rent and all costs be satisfied (*n*): although it has long been usual, on conveyance of land in consideration of a rent-charge, to reserve such a power (*o*). But a stipulation that the rent-charge should be secured by "proper provisions" would certainly entitle the vendor to have the same secured by such a right of entry (*p*). The vendor is not entitled, without express stipulation, to have reserved to him a power in default of payment of the rent to limit a term to a trustee on trust to raise the arrears by sale or otherwise (*q*). And if no such express stipulation were made in the contract of sale, and the remedies for recovering the rent-charge are to be reserved, as is now usual, by tacit incorporation in the conveyance of the 44th section of the Conveyancing Act of 1881 (*r*), the purchaser should be careful to insert a proviso modifying the operation of that enactment in accordance with his rights under the contract, and excluding the power to limit a term, which the statute would otherwise confer (*s*). The vendor is not

(*l*) *Bower v. Cooper*, 2 Hare, 408; 1 Dart, V. & P. 562, 5th ed.; 634, 6th ed.; 585, 7th ed.; Davidson, *Prec. Conv.* vol. ii. pt. i. 509, n., 4th ed.

(*m*) See *Wms. Real Prop.* 432, 21st ed. This is none the less so that a remedy by distress was given for rent seek by stat. 4 Geo. II. c. 28, s. 5.

(*n*) See *Expte. Ralph*, De G. 219.

(*o*) Davidson, *Prec. Conv.*

vol. ii. pt. i. 508 and n., 4th ed.; *Wms. Real Prop.* 337, 13th ed.; 425, 20th ed.

(*p*) *Expte. Ralph*, De G. 219.

(*q*) See *Expte. Ralph*, De G. 219; Davidson's *Concise Precedents*, 207, n. (*a*), 18th ed.

(*r*) Stat. 44 & 45 Vict. c. 41; see *Wms. Real Prop.* 433, 436, 21st ed.; *Wms. Conv. Stat.* 216, 217.

(*s*) Davidson's *Concise Precedents*, 207, n. (*a*), 18th ed.

Sale partly in consideration of an agreement by the purchaser to build.

entitled, in the absence of express stipulation, to have a power limited to him in default of payment of the rent to re-enter on the land and hold the same as his own.

Where land is sold partly in consideration of an agreement by the purchaser to erect buildings thereon, it is thought that, unless the contract otherwise provide, the vendor is only entitled to have the purchaser's covenant to erect the buildings (*t*). It is therefore desirable for the vendor to insert in such a contract an express stipulation that he shall, in default of due performance of the covenant, have a power of re-entry and holding the land until the covenant be performed, such power to be exercisable within a period not exceeding the limits of the rule against perpetuities; and it is sometimes advisable to make such a stipulation where it is agreed that the purchaser shall observe restrictions on the use of the land sold (*u*). But it seems that a stipulation that the performance of the covenants shall be secured "by proper provisions" will entitle the vendor to have such a power of re-entry reserved to him (*x*).

Whether the usual remedies for securing a rent-charge in fee are void for remoteness.

An express power of distress granted either in terms or by the operation of the 44th section of the Conveyancing Act of 1881 (*y*) is certainly not obnoxious to the rule against perpetuities. Such a power is, as we have seen, of the essence of a rent-charge; it merely confers by express grant the same remedy as is annexed to rent service at common law and now by statute to rent seck (*z*); it creates no separate future interest in the land apart from the rent; and it has been known to the

(*t*) See above, pp. 648, 666.

(*u*) It is not equally necessary in all cases, as the burden of restrictive covenants will in equity run with the land, and they may be enforced by action for injunction against any one acquiring the land with notice thereof; while covenants to build are only

enforceable by action at law on the covenant against the covenantor personally and his representatives in law; see above, pp. 491 *sq.*

(*x*) See *Expte. Ralph, De G.* 219.

(*y*) Stat. 44 & 45 Vict. c. 41.

(*z*) Above, p. 673, n. (*m*).

law and always treated as unquestionably valid from Littleton's time (*a*) onward (*b*). It is submitted that the better opinion is that a right reserved on the creation of a rent-charge in fee for the owner of the rent, his heirs and assigns to enter on the land charged in default of payment of the rent at any time and to hold the same until the arrears of the rent and all expenses shall be satisfied out of the rents and profits is not void for remoteness, although its exercise be not confined to the duration of existing lives and twenty-one years after; and that this is the case whether such right of re-entry be created by direct reservation or by means of the Statute of Uses. For it has always been considered that such a power of entry, being given by way of remedy only for recovery of the rent, is merely a part of the estate which the grantee of the rent has in the rent limited to him; the power passes by a grant of the rent as incident thereto, whereas if it had been an independent interest or condition it would have been inalienable at common law, and the heir alone and no assign of the grantee could have made use of it (*c*); and it gives only a right of seizure and temporary occupation, which does not divest the estate of the tenant (*d*), and confers no more than an interest to take the profits in the nature of a distress (*e*). The right created by such a power appears, therefore, not to be an interest, independent of the rent, to arise at a future

Power of
re-entry to
satisfy
arrears.

(*a*) Litt. ss. 216—218.

(*b*) The writer is not aware that its validity has ever been attacked; but in view of the modern extension of the rule against perpetuities, and the alarm inspired thereby amongst the weaker brethren, he has thought it worth while to state the reasons for maintaining the validity of such a power.

(*c*) *Haverhill v. Hare*, Cro. Jac. 510; see Wms. Real Prop. 338,

368, 402, 21st ed.: Sug. Pow. 43, 44.

(*d*) The rent-owner entering under such a power may indeed demise the land, but can only confer on the tenant an interest co-extensive with his own, that is to say, determinable on payment or satisfaction of all arrears: see Litt. s. 327; *Haverhill v. Hare*, Cro. Jac. 510; *Jenard v. Gaulty*, 1 Lev. 170.

(*e*) Co. Litt. 203 a.

time in the land out of which the rent issues, and so not to fall within the class of future interests in land which must conform with the rule against perpetuities (*f*). And it is submitted that there is no occasion, on conferring such a power of entry in connexion with the creation of a rent-charge in fee, to confine the possible exercise thereof within the term of some existing lives and twenty-one years after (*g*). There appears to be no doubt, however, that a power given to the owner of a rent-charge in fee, in case of non-payment of the rent-charge at any time, to limit an *absolute* term of years to a trustee on trust to raise the arrears by sale or mortgage thereof, is invalid; for the creation of such a term would confer an interest in the land charged, which would not be determinable on payment or satisfaction of the arrears of the rent (*h*); and such a future interest, capable of existing independently of the rent must, it is thought, be limited to arise within the time allowed by the rule against perpetuities or it will be void (*i*). If, therefore, use be made of the 44th section of the Conveyancing Act, 1881 (*k*), on the creation of a rent-charge in fee, care must be taken to confine the possible

Power to limit
a term.

(*f*) See Third Report of Real Property Commissioners, 37; Sug. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; Gray, Rule against Perpetuities (Boston, 1886), § 303, p. 216; and observe that the practice sanctioned by the most eminent conveyancers has long been to limit such powers of entry as security for the payment of a rent-charge in fee without confining the time of their possible exercise within the period allowed by the rule against perpetuities and without expressing any doubt as to their validity: Davidson, Prec. Conv. vol. ii. pt. i. 508 and n., 4th ed.; Wms. Real Prop. 337, 13th ed.; 1 Key & Elph. Prec. Conv. 335, n., 603, 4th ed.; Davidson's Concise Precedents, 206, 207, 18th ed.

(*g*) The opposite course is

now recommended in 1 Key & Elph. Prec. Conv. 365, n. (*g*), 498, 634, 9th ed. It is submitted, however, that notwithstanding the case of *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540, the better opinion as to the law and proper practice is that expressed in the authorities referred to in the previous note.

(*h*) See above, p. 675, n. (*d*).

(*i*) Such a power, it must be remembered, could not be conferred by any common law disposition, but could only be created under the law of shifting use or executory devise: see Wms. Real Prop. 376 *sq.*, 21st ed.

(*k*) Stat. 44 & 45 Vict. c. 41, which is thought to confer no greater power of limiting a term than the landowner has without it.

exercise of the power of limiting a term therein mentioned (if this power be not altogether excluded (*l*)) to the period of the duration of some existing lives or life and twenty-one years after. With regard to the limitation, on the conveyance of land in consideration of a rent-charge in fee to issue thereout, of a power for the grantee of the rent, his heirs and assigns to enter in case of non-payment of the rent at any time and thenceforth to hold the land charged in fee as his or their own, if such a power is reserved by way of shifting use, as it must be to enable the grantee's assigns to take advantage of it (*m*), it will be void unless limited to the time allowed by the rule against perpetuities (*n*). And so will a like power of entry limited by way of shifting use to arise on breach of covenant (*o*). In either case the power is quite different from a power annexed to a rent to enter and satisfy arrears; for a power to enter and hold the land absolutely defeats altogether the estate given subject to the power (*p*), the event in which the power is to be exercisable being a cause of forfeiture of that estate. As to conditions of entry limited on gifts of land at common law to the donor and his heirs, they were in use and were considered to be perfectly valid long before the rule against perpetuities was heard of (*q*), and the opinion of the Real Property Commissioners was that, although these conditions came within the *policy* of the modern rule against perpetuities, their validity was not affected by that rule, as it then existed (*r*). Recently, however, the opinion has been

Power of re-entry by way of forfeiture.

(*l*) Above, p. 673.

(*m*) See Litt. ss. 325, 347, 348; Co. Litt. 201, 214, 215; Butler's notes to Co. Litt. 203 a, b; above, p. 675, and n. (*c*).

(*n*) Third Rep. of Real Prop. Commrs. 37; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540, 549.

(*o*) Above, p. 674.

(*p*) See above, p. 675.

(*q*) Litt. s. 325; Co. Litt. 201, 202.

(*r*) See their Third Report, pp. 29, 36, 37. Their opinion was and it was long considered by very eminent lawyers that the rule against perpetuities related only to future interests created by way of shifting use or executory devise: see Wms. Real Prop. 276, 277, 319 *sq.*, 13th ed.; Davidson, Prec. Conv. vol. iii. pt. i. 336, 3rd ed.

judicially expressed that a common law condition of re-entry annexed to a grant of land in fee is invalid unless the event, in which the power of entry is to arise, must occur within the time allowed by the rule against perpetuities (*s.*). If, then, on sale of land in consideration

(*s.*) North, J., *Dunn v. Flood*, 25 Ch. D. 629; Baggallay, L. J., *S. C.*, 28 Ch. D. 592; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 510. In the former case the opinions expressed were *obiter dicta*; and according to the report the power of entry was created by covenant only and in favour of the vendors, without mentioning their heirs and assigns. If this be correct there could have been no objection on the score of perpetuity; for the power of entry would only have been exercisable by the vendors themselves in their lifetime. In the latter case the point was not precisely determined. It was a vendor and purchaser summons raising the question whether it was an objection to title that the land sold was subject to a common law condition of reverter to a former owner's heir in an event which might occur at an unlimited time after the creation of the condition. Byrne, J., expressed the opinion that the condition was void, but decided that the title was too doubtful to be forced on an unwilling purchaser, since the person who would be entitled under the condition (which if valid would have come into effect on the conveyance completing the sale) was no party to the proceedings and threatened litigation against the purchaser. The learned judge must therefore have considered that it was reasonably open to doubt whether the person entitled in case of the validity of the condition had not a good cause of action. It should be noted that the opinion of the Real Property Commissioners (3rd Rep. p. 37) was not cited in either of these cases. Byrne, J., in the latter case, admitted that there was no authority on the point and simply adopted the view maintained in Lewis on Perpetuities, 616, saying that, except in Challis on Real Property, 174—177, 2nd ed., he could find no definite statement of a contrary opinion. It is submitted that on such a question the opinion of the Real Property Commissioners is of greater weight than that of Mr. Lewis. But of course, as Mr. Justice Byrne well pointed out, instancing the analogous progress of the law as to contracts in restraint of trade, the boundaries of the rule against perpetuities have been of late considerably extended, and several interests which formerly were only within the *policy* of the rule have been drawn definitely within the ambit of the rule itself: see *London and South Western Rail. Co. v. Gomm*, 20 Ch. D. 562; *Re Frost*, 43 Ch. D. 246; Wms. Real Prop. 406—417, 21st ed. If, however, covenants for the perpetual renewal of leases are to be considered as outside the rule because their validity was established before the modern development of the perpetuity rule (and it is submitted that their exception cannot be well founded on any other principle: see an article by the writer in 42 Sol. J. 628), surely common law conditions, which are of much greater antiquity, might be allowed a similar immunity. One very strong argument in favour of the validity of common law conditions of re-entry, though unrestricted as to time, is that by the common law, if an estate be given to a man and his heirs upon some condition subsequent, a right of re-entry on breach of the condition is *implied* in favour of the donor and his heirs; Litt. ss. 328, 329, 331. It does not appear that the law has been altered in this respect. But if common

of a rent-charge and a covenant to build or to observe restrictive covenants, the vendor stipulate for the reservation of a right of re-entry by way of forfeiture on non-payment of the rent or breach of covenant, such right of entry must, if it is to be extended to the vendor's assigns, be created by way of shifting use and must therefore be limited to arise within some lives or life in being and twenty-one years after (*t*). And in the present state of the law it would be unwise to create a common law condition of re-entry without limiting the time of its possible exercise in the same way (*u*). And it is thought that this is equally the case where land is sold partly in consideration of the performance of building or restrictive covenants and it is stipulated that the performance of the covenants shall be secured by a power of re-entry and holding till performance of the covenants (*x*). In this case also it appears that a right for the vendor's assigns to re-enter can only be secured by a shifting use (*y*); and as the right to enforce a building covenant can confer no interest in the land to be built on, and the right to enforce a restrictive covenant is merely an equitable interest in the land thereby affected (*z*), it does not appear to be maintainable that a right of re-entry of this kind is a part of the estate of the person entitled to enforce the covenant; which is, as we have seen (*a*), the ground on which a like power of entry annexed to a rent is asserted to be valid, though unlimited as to time.

Power on
breach of
covenant to
enter and hold
until perform-
ance thereof.

Another matter which may be conveniently discussed

law conditions should be subject to the rule against perpetuities, it would apparently follow that such an implied condition of re-entry would be void, as being exercisable at *any* future time.

(*t*) Above, p. 677.

(*u*) See above, p. 372 and n.
(*f*).

(*x*) Above, p. 675. See Davidson, *Proc. Conv.* vol. ii. pt. i. p. 511 and n. 4th ed.: 1 Key & Elph. *Proc. Conv.* 335, n. 467, 604, 4th ed.: 338, n. 464, 594, 8th ed.; Davidson's *Concise Preecedents* 210 and n. 1 ^{1/2}, 18th ed.

(*y*) See above, p. 675.

(*z*) Above, pp. 491 *sq.*

(*a*) Above, p. 675.

Delivery of
the title deeds
on completion.

in connection with the preparation of the conveyance is the delivery to the purchaser of the title deeds or other muniments of title, and the vendor's duty to give or procure proper statutory acknowledgments of right to production and undertakings for safe custody of any documents of title lawfully retained in the possession of the vendor himself or any other person. The general rules governing this matter upon a sale by open contract have been already stated (*b*). The vendor is bound, in the absence of special stipulation, to deliver over to the purchaser on completion all documents of title, which are or should rightly be in his own possession and relate solely to the property purchased, whatever be their date and whether abstracted or not (*c*). The documents, which must be so handed over, include not only the title deeds and such other muniments of title as will pass without express mention by a conveyance of the land itself (*d*), but also all documents produced for the purpose of verifying the abstract in proof of any fact stated therein; such as certificates of baptism, marriage or burial, statutory declarations as to matters of pedigree or as to the identity of the property sold, or certificates of the result of an official search for judgments or other matters (*e*). But of course documents, such as a marriage settlement, merely produced to show that they do not affect the land sold (*f*) cannot be required to be given up to the purchaser. It appears that in general the vendor is not obliged to hand over the receipts for payments made on account of any of the death duties (*g*); for although these may be evidence (especially in the case of

(*b*) See above, pp. 34, 47, 48.

(*c*) Sug. V. & P. 407; Dart, V. & P. 673, 5th ed.; 762, 6th ed.; 693, 7th ed.

(*d*) See *Harrington v. Price*, 3 B. & Ad. 170; *Philips v. Robinson*, 4 Bing. 106; *Re Williams*

and *Newcastle's Contract*, 1897, 2 Ch. 144, 148; Wms. Pers. Prop. 126, 16th ed.

(*e*) See above, pp. 144, 153—155, 604.

(*f*) See above, p. 134.

(*g*) See below, Chap. XXI.

succession duty) that a charge of duty on the land sold has been satisfied, they are principally evidence of the discharge of the person who made the payment from a personal liability or accountability to the Crown, and on this ground he appears to be entitled to retain them. But it seems that any written statement or certificate (such as may be given in the case of estate duty (*h*)) of the Inland Revenue Authorities, which merely purports to show that the land sold is discharged or free from any lien or claim for some particular death duty, ought to be delivered up to the purchaser. As we have seen (*i*), the Vendor and Purchaser Act, 1874, provides that, in the absence of stipulation to the contrary, where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents (*k*). It has been held that, as this Act relates only to sales of land, this enactment only applies where the vendor retains some land or interest in land, to which the documents of title relate; so that where a mortgage had been made of land together with policies of insurance on the mortgagor's life, and the mortgagee sold the land under his power of sale, but not the policies, it was decided that the mortgagee was bound to hand over the mortgage deed to the purchaser (*l*). This case appears to have been argued and decided solely upon the construction of the enactment quoted: but it is submitted that the matter ought rather to have been referred to the principle contended for before the Vendor and Purchaser Act was passed, namely, that where a title deed of any land sold relates also to other property of the vendor, he should be at liberty to retain it (*m*); and that the intention of the Act was merely to declare the law in

*Re Williams
and New-
castle's
Contract.*

(*h*) See below, Chap. XXI.

(*i*) Above, p. 47.

(*k*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 5.

(*l*) *Re Williams and Newcastle's Contract*, 1897, 2 Ch. 144.

(*m*) 2 Dart, V. & P. 618, 4th ed.; Wms. Pers. Prop. 11, 11th ed.; 127, 16th ed.

cases where the vendor retained some *land* and not to legislate for cases in which he retains some personal chattels to which the deed in question is also a title deed. Suppose that land and personalty were vested in trustees by one deed of settlement, the land being settled on trust for sale, would the trustees be obliged on a sale of the land to hand over the deed of settlement to the purchaser? It is thought not. But if this opinion be right, it must rest on the above-mentioned principle; as it does not appear that the fact, that the trustees have duties to perform under the deed, is of itself sufficient to justify their retaining it. For where land alone is settled on trust for sale and the trusts of the purchase money are declared by the same deed, it is considered that the trustees are not entitled to retain the deed of settlement on a sale of all the land (*n*); and for this reason it is the practice to declare the trusts of the purchase money by a deed separate from the conveyance on trust for sale (*o*). But in any case where land has been settled along with personal chattels by the same deed either upon trust for or with power of sale, and in any other case in which some title deed of land sold relates also to personal chattels retained by the vendor, he should be careful, so long as the decision in *Re Williams and Newcastle* is not overruled, to stipulate expressly that he shall retain it. It does not appear that a vendor, who is not retaining any land to which the title deeds relate, is entitled to retain them on the ground that he has entered into a covenant to produce them: but in such case, as the vendor will remain under a personal liability, the purchaser must covenant to perform the obligations which were so undertaken by the vendor and to indemnify him

Vendor, who has covenanted to produce the deeds.

(*n*) 2 Dart, V. & P. 675, 5th ed.; 763, 6th ed.; 694, 7th ed.

(*o*) Davidson, Prec. Conv. vol. iii. 59, 857, 3rd ed.; Williams on Settlements, 125.

against their non-performance (*p*). If the vendor should prior to the sale have given a statutory acknowledgment and undertaking with regard to any document of title, that is of course no reason for retaining it; as the acknowledgment imposes no personal liability and the undertaking imposes no liability on the undertaker after he has parted with the possession or control of the document (*q*). The vendor is of course not bound to obtain and hand over any documents of title lawfully remaining in the possession of any other person than himself; as where he himself has no more than a right to their production under a statutory acknowledgment or a covenant, or where the documents are in the possession of a mortgagee of other land, or a mortgagee who is not to be paid off.

Vendor who has given a statutory acknowledgment and undertaking.

Where lands held under one title are put up for sale in lots, without any special stipulation as to the custody of the title deeds, it is considered that, if all the lots be sold, the title deeds should be delivered to the purchaser of the largest part in value of the lands (whether that part be contained in one lot or several lots), and that he should give statutory acknowledgments and undertakings to the other purchasers (*r*). If and so long as any lot remain unsold, the vendor will be entitled to retain the deeds (*s*). But it is usual and proper on a sale by auction of land in lots to make special stipulations to the like effect; and these generally provide that the deeds shall, after all the lots shall have been sold, whether at the auction or afterwards, be delivered to the

Sale of Land in lots.

(*p*) Sug. V. & P. 434, 435; Dart, V. & P. 561, 675, 5th ed.; 633, 763, 6th ed.; 584, 691, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 664, n., 4th ed.; see above, p. 667.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 9 (2), (9).

(*r*) See *Griffiths v. Hutchard*, 1 K. & J. 17, 18; Sug. V. & P. 34; Dart, V. & P. 144, 671, 5th ed.; 162, 762, 763, 6th ed.; 158, 693, 694, 7th ed.; 1 Davidson, Prec. Conv. 147, 589, 4th ed.

(*s*) Above, p. 681.

purchaser of the largest part in value of the lands sold (*t*).

Solicitor's
lien on the
deeds.

It has already been considered (*u*) how far the existence of a solicitor's lien on the title deeds may be an obstacle to their delivery to the purchaser (*u*). The vendor's solicitor can acquire no lien on the draft or engrossment of the conveyance by reason of its being handed to him for approval on behalf of or execution by the vendor; as both draft and engrossment are the property of the purchaser (having been prepared at his expense (*x*)), and must be returned to him, whether the contract be completed or rescinded (*y*).

Vendor's duty
to furnish
statutory
acknowledg-
ments and
undertakings.

As we have seen (*z*), the vendor is, as a rule, bound to furnish the purchaser with proper statutory acknowledgments and undertakings for the production and safe custody of any title deeds or other muniments of title which may lawfully be withheld from the purchaser on completion, and are necessary to make a good title according to the contract. This rule, it will be observed, does not oblige the vendor to furnish any acknowledgment or undertaking with regard to any document of title dated prior to the time fixed by law or agreed upon for the commencement of title. The rule is, moreover, subject to two important exceptions. First, it does not apply to documents in public or official custody or other documents, not being in the vendor's possession or

What docu-
ments should
be included
in a statutory
acknowledg-
ment.

(*t*) 1 Davidson, *Prec. Conv.* 621, 638, 644, 4th ed.; Davidson's *Concise Precedents*, 125, 18th ed.; 1 *Key & Elph. Prec. Conv.* 332, 8th ed.; above, p. 82. Note that if it be stipulated that the purchaser of the *largest lot* shall have the deeds, the purchaser of the lot largest in area will be entitled to them: *Griffiths v. Hatchard*, 1 K. & J. 17; and under a condition giving the custody of the deeds to the

purchaser of the largest *lot* in value, they will go to the purchaser of the one lot which has fetched the highest price, not to the purchaser of other lots, which have together realised a larger sum: *Scott v. Jackman*, 21 Beav. 110.

(*u*) Above, p. 128.

(*x*) Above, p. 46.

(*y*) *Oxenham v. Esdaile*, 2 Y. & J. 493, 3 Y. & J. 262.

(*z*) Above, pp. 34, 47, 48.

power, of which the purchaser can always obtain good evidence for himself (*a*). It does not therefore apply to deeds of bargain and sale enrolled, or to copies of court roll not remaining in the vendor's possession or power : but where the vendor retains any copies of court roll forming part of the abstracted title, he must give an acknowledgment and undertaking with regard to them (*b*). It is strange that it is not settled whether the probate of a will or letters of administration forming part of the title should be included in an acknowledgment for production (*c*). Of course an unproved will of realty only (*d*) should ; for that remains in private custody. And it seems that, on a sale of leaseholds, the probate of a will or letters of administration forming part of the title, should, if retained by the vendor, be included in the acknowledgment ; as the probate, or an exemplification thereof, and not the original will, is the only proper evidence of the will, and the letters are the proper evidence of the administrator's title (*e*). It appears too that whenever executors as such have taken an interest in or exercised a power over the land sold, as under the Land Transfer Act, 1897, or Lord St. Leonards' Act (*f*), the probate of the will, being the proper evidence of their appointment, ought, if retained, to be included in the acknowledgment ; and this is equally true with regard to the letters of administration in the case of an administrator. And it may be contended that, since the probate of a will has been made admissible evidence of a devise of realty (*g*), it ought always to be the subject of an acknowledgment

(*a*) Above, p. 48, and n. (*a*).

(*b*) *Cooper v. Emery*, 1 Ph. 388.

(*c*) It is submitted that, on a sale of land by the executor of a will, or by an administrator, he is entitled to retain the probate or letters of administration, which it is necessary that he should have

until he has fully administered : cf. above, p. 682.

(*d*) Above, pp. 161, 162.

(*e*) Above, p. 161, n. (*e*) : Taylor on Evidence, §§ 425, 1589, 9th ed. : 2 Wms. Exors. 1889, 7th ed.

(*f*) Above, pp. 226, 232.

(*g*) Above, p. 161, n. (*x*).

and undertaking, where it forms part of the title and is retained. As we have seen (*h*), however, office copies of wills and letters of administration are accepted as good evidence on a sale; and office copies of wills may be put in evidence in Court to prove a devise of realty under the same conditions as the probates may (*i*). For these reasons, perhaps, it has not been the general practice to include probates or letters of administration in a covenant or an acknowledgment for production of documents of title: but it is submitted that a claim for their inclusion could not be successfully resisted (*k*). And it is not usual in practice to include in acknowledgments copies (whether attested, certified, official or otherwise) of any documents, or certificates of baptism, marriage or burial, or receipts of payment of any death duties (*k*); although, as regards office copies and receipts for succession or estate duty retained by the vendor, this seems hardly to conform with the principle laid down by the Court (*l*). Statutory declarations, which the vendor would be bound to hand over if they related solely to the land bought, should, if retained by him, be the subject of an acknowledgment. The purchaser cannot require any

Statutory
declarations.

(*h*) Above, pp. 150, 161.

(*i*) See stat. 20 & 21 Vict. c. 77, ss. 62, 64.

(*k*) See *Cooper v. Emery*, 1 Ph. 388; Davidson, *Prec. Conv.* vol. ii. pt. i. 663, 664, n., 4th ed.; 1 Key & Elph. *Prec. Conv.* 457, n., 4th ed.; 454, n. (*c*), 8th ed.

(*l*) *Cooper v. Emery*, 1 Ph. 388. Of documents of which office copies are issued, a purchaser can of course obtain as good evidence himself, and copies of receipts for payments of death duties will be issued by the authorities to persons applying in good faith and in proper circumstances: Davidson, *Prec. Conv.* vol. ii. pt. i. 662, n., 4th ed. But where such office copies or

receipts remain in the vendor's possession or power, on what principle can he decline to give an acknowledgment for their production? The usual practice certainly appears unjustifiable on principle in the case of receipts for succession duty or certificates of discharge of estate duty; for these are good original evidence of the discharge of a lien on the land and remain in private and not official custody. It is submitted that any official statement in writing, or certificate purporting solely to declare that the land sold together with other land is free or discharged from all claim of duty (see above, p. 681), ought certainly to be included in an acknowledgment.

acknowledgment for production of a document produced merely to prove that it does not affect the property sold, unless it be in the vendor's own possession or power (*m*).

Secondly, where any documents forming part of the title contracted for are not in the vendor's possession, but he is entitled at law to the benefit of a covenant or statutory acknowledgment for their production, and the legal right to enforce this covenant or acknowledgment will pass to the purchaser on completion, the purchaser is not entitled to demand that a fresh covenant or acknowledgment shall be procured for him from the person in possession of the documents; for that would confer upon him no better right than he will have without it: but he is entitled, if the deed of covenant or the acknowledgment by which this right is conferred may be withheld from him, to have a statutory acknowledgment for the production of that document (*n*). Here it may be observed that the benefit of a covenant to produce title deeds will run at law with the covenantee's lands, to which the deeds relate: but it is now considered that the burden thereof does not run at law with the lands retained by the covenantor (*o*). It is thought, however, that in equity the covenantor's successors in title to the deeds (other than purchasers for value without notice of the covenant) would be affected by the duty of production; for this seems to resemble a restriction on the free use of the deeds rather than an obligation positively affirmative, such as a

Where the purchaser will have the legal right to enforce an existing covenant or acknowledgment for production.

(*m*) Sug. V. & P. 436; Dart. V. & P. 676, 5th ed.; 764, 6th ed.; 695, 7th ed.

(*n*) See Sug. V. & P. 453, n.; *Gabriel v. Smith*, 16 Q. B. 847, 852—854, 861, where note that the vendor had only the benefit of covenants for production of the bulk of the title deeds, but that the objection made was that there were two title deeds of

which he had not and the purchaser would not have the benefit of a covenant for production.

(*o*) See *Austerberry v. Oldham*, 29 Ch. D. 759, 773, 775—778, 781—784; Farwell, J., *Rogers v. Hosegood*, 1900, 2 Ch. 388, 394—396; 1 Davidson, *Proc. Conv.* lvi., 5th ed.; 1 Key & Elph. *Proc. Conv.* 311, n., 4th ed.

liability to lay out money (*p*). And it appears that, where the ownership of any land held under one title is divided, whether by sale, settlement or otherwise, and the title deeds remain in the possession of the owners of a part, the owners of the rest of the land have an equitable right, independently of any covenant, to enforce production of the title deeds in order to defend their title or effect any sale or like disposition of their lands (*q*). It is thought, however, that this right, like any other equity, may be lost, if the deeds come to the hands of a purchaser for value who has acquired a legal interest in them in good faith without notice of the right. But the fact that the purchaser will on completion have this equitable right to production of the title deeds does not prevent him from claiming an acknowledgment for their production; he is entitled to have secured to him either the *legal* right to enforce a covenant for production or the benefit of an acknowledgment (*r*). The vendor is therefore bound to procure such covenant or acknowledgment for the purchaser, if he can; and must, it is thought, use his best endeavours to do so (*s*). But if these fail, then by the Vendor and Purchaser Act, 1874 (*t*), the inability of the vendor to furnish such covenant or acknowledgment will not be an objection to the title, if the purchaser will, on the completion of the contract, have an equitable right to the production of the documents. Where

(*p*) See *Austerberry v. Oldham*, 29 Ch. D. 750; Sug. V. & P. 453 and n.; 2 Dart, V. & P. 775, 5th ed.

(*q*) See as to a purchaser of part, *Fain v. Ayers*, 2 S. & S. 533; as to joint tenants, tenants in common, and co-parceners, Sug. V. & P. 443; *Lambert v. Rogers*, 2 Mer. 489; *Elton v. Elton*, 6 Jur. N. S. 136; *Shore v. Collett*, G. Coop. 234 (after partition); as to remaindermen,

Lempster v. Pomfret, 1 Dick. 238; *Davis v. Dysart*, 20 Beav. 405; and see Sug. V. & P. 442—445, 453 and n.

(*r*) See *Barclay v. Raine*, 1 S. & S. 449; Sug. V. & P. 452, 453, n.; *Gabriel v. Smith*, 16 Q. B. 847, 861.

(*s*) See *Day v. Singleton*, 1899, 2 Ch. 320.

(*t*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 3.

the purchaser will have neither the benefit of a good statutory acknowledgment or legal covenant for the production of the title deeds, nor any equitable right to obtain their production, it is thought that he may decline to complete the contract; unless of course the case has been duly provided for by special stipulation.

It is considered that in any case in which a vendor would, according to the law in force before the Conveyancing Act, 1881 (*u*), be bound to give an unqualified covenant for the production and safe custody of title deeds (*x*), he is now bound to give a statutory acknowledgment and undertaking for the same purposes. And if he propose to do this, he is not bound to enter into a covenant in the old form; for by that Act (*y*) an acknowledgment shall satisfy any liability to give a covenant for production and delivery of copies of any documents, and an undertaking shall satisfy any liability to give a covenant for safe custody of documents (*z*). If, therefore, a man sell land under an open contract or apparently as beneficial owner, he is bound to furnish the purchaser not only with proper statutory acknowledgments, but also with proper statutory undertakings with regard to any documents of title (except as above mentioned (*a*)) which may rightly be withheld from the purchaser. But if a man sell as trustee or as mortgagee,

Vendor must, as a rule, give both acknowledgment and undertaking.

(*u*) Stat. 44 & 45 Vict. c. 41.

(*x*) See Sugr. V. & P. 452; 1 Dart, V. & P. 555, 5th ed.; 1 Davidson, Prec. Conv. 222, n. *t*, 223, 592, 4th ed.; Wms. Conv. Stat. 97, 102.

(*y*) Sect. 9 (9), (11).

(*z*) A vendor is apparently at liberty to covenant absolutely for production and safe custody in the old form, if he will; for his liability is to give such a covenant, though that liability may be satisfied by his giving an

acknowledgment and undertaking. But the statutory acknowledgments and undertakings are better for both parties than the covenants in use under the old practice. The giver obtains the limitation of his liability to the time during which he has possession or control of the documents; and the receiver gets the benefit of the statutory obligation running with the documents at law: see stat. 44 & 45 Vict. c. 41, s. 9 (2), (9); above, p. 687.

(*a*) Above, pp. 684-686.

Proper acknowledgment and undertaking can only be given by the person retaining possession of the documents.

Sale by mortgagor with mortgagee's concurrence.

it is thought that he will be bound to give an acknowledgment only (*b*): although it is advisable (*c*) for trustees and mortgagees selling as such to stipulate expressly that they shall not be required to give the statutory undertaking. It should be particularly noted that only the person who *retains possession* of documents is capable of giving a proper acknowledgment for their production and undertaking for their safe custody, which will have the right statutory effect (*d*). Thus, if a mortgagor sell part of the mortgaged lands, proposing to convey the same with the concurrence of the mortgagee, who will of course retain possession of the title deeds, the mortgagee is the only person who can give a valid statutory acknowledgment and undertaking with respect to them, and the mortgagor cannot do so. The mortgagee does not, as a rule, object to give the acknowledgment; but it is objectionable to him to give the undertaking, which involves a personal liability. The mortgagor's liability to covenant or undertake for safe custody is therefore properly satisfied, not by his purporting to give a statutory undertaking (*e*), but by his covenanting that he will give a statutory undertaking when the documents shall come into his possession, and that in the meantime, until such undertaking shall be given, the possessor of the documents shall keep them safe, whole, uncanceled and undefaced, unless prevented

(*b*) *Re Agg-Gardner*, 25 Ch. D. 600; Davidson's Concise Precedents, 30, 690, n., 18th ed.

(*c*) The reason is that, under the old practice, trustees used to covenant for safe custody: though it was considered doubtful whether they were obliged to do so; see Davidson, *Prec. Conv.* vol. i. 222, n. 1, 223, 592, 613; vol. ii. pt. i. 667, and n. (*a*), 670, 4th ed.

(*d*) See stat. 44 & 45 Vict. c. 41, s. 9; *Re Pursell and*

Deakin's Contract, 1893, W. N. 152.

(*e*) If he were to do so, that would apparently create a contract at common law fixing him with an absolute liability for the safe custody of the deeds, without the exception of fire and inevitable accident: see *Expte. Stanford*, 17 Q. B. D. 259, 271. But such an undertaking would not have the statutory effect; not even if the deeds should afterwards come into the undertaker's possession.

from doing so by fire or other inevitable accident (*f*). And it is thought that the mortgagor is bound to give such a covenant, in the absence of stipulation to the contrary, the regular practice in this case prior to the Conveyancing Act, 1881, having been for the mortgagor to covenant both for production and safe custody of the title deeds (*g*). It would be very unreasonable in such a case for the mortgagee to refuse to give an acknowledgment, which involves him in no personal liability: but the purchaser could not, of course, compel him to do so, if he were no party to the contract (*h*). The mortgagor would, as we have seen, be bound to use his best endeavours to procure an acknowledgment from the mortgagee: but if the mortgagee, though willing to concur in the conveyance, should persist in refusing to give an acknowledgment, the purchaser would, it appears, be obliged to accept the title. For he would, it is thought, have an equitable right against the mortgagee, as being a party to the conveyance to him, to production of the title deeds for all proper purposes (*i*). In such case, however, the purchaser should

(*f*) This is the duty imposed by a statutory acknowledgment: stat. 44 & 45 Vict. c. 41, s. 9 (9).

(*g*) Davidson, *Prec. Conv.* vol. ii. pt. i. 318, n. (*d*), 321, n. (*e*), 4th ed.: *Re Parsell and Deakin's Contract*, 1893, W.N. 152. The mortgagor's liability is to give an absolute covenant for safe custody: but it is more beneficial to both parties that he should covenant to give an undertaking and for safe custody in the meantime: see above, p. 689, n. (*z*).

(*h*) In such cases the mortgagee is usually under no contract with the mortgagor, and can refuse to join in the conveyance except on his own terms or on being paid off altogether. It is submitted that the suggestion made in 1 Key & Elph. *Prec. Conv.* 461,

n. (*e*), 7th ed., that a mortgagee not fully paid off and retaining the title deeds by virtue of his mortgage is bound to give an acknowledgment is not warranted by the authorities cited (*Vates v. Plummer*, 2 Sm. & Giff. 174; 2 Dart, V. & P. 678, 5th ed.; 766, 6th ed.; 697, 7th ed.); for in that case the mortgagees were retaining the deeds, not only in right of their mortgage, but also and chiefly as owners of a larger estate of which the mortgaged lands formed part, and it was as such owners that they were held liable to covenant for production. See now 1 Key & Elph. *Prec. Conv.* 483, n. (*i*), 8th ed.; 520, n. (*b*), 9th ed.

(*i*) Above, pp. 687—689; Davidson, *Prec. Conv.* vol. ii. pt. i. 321, n. (*c*), 4th ed.

Person in
constructive
possession of
documents.

require the vendor to covenant that he will give a proper statutory acknowledgment, as well as undertaking, with regard to the title deeds, when they shall come into his possession, and also for production and safe custody of the deeds in the meantime (*k*). Here it may be observed that a person in constructive possession of documents of title appears capable of giving an effectual acknowledgment and undertaking with regard to them; so that where title deeds remain in the possession of solicitors as bailees for safe custody only, their owner can nevertheless enter into a statutory acknowledgment and undertaking for their production and safe custody. It is not equally clear that this is the case where the documents are in the possession of solicitors who have a lien upon them for their charges: but it is submitted that a man retains possession of documents within the meaning of the 9th section of the Conveyancing Act of 1881 (*l*), where the documents are in the custody of his solicitors as bailees for him, notwithstanding that his solicitors have the usual solicitors' lien thereon for their charges. And having regard to the nature of solicitors' lien on their clients' title deeds (*m*), it certainly appears that where a vendor's solicitors, who act for him generally in the matter of the sale, have the custody of the title deeds, apparently on his behalf alone, and produce them for the purchaser's inspection and approve on the vendor's behalf of a conveyance or an agreement containing a statutory acknowledgment and undertaking by the vendor with regard to them, without insisting on or giving notice of any lien thereon, they must be taken to have waived their lien as regards the creation of the rights conferred by the acknowledgment and undertaking (*n*). The regular practice is to take acknowledg-

(*k*) Above, p. 690.

(*l*) Stat. 44 & 45 Vict. c. 41.

(*m*) See above, pp. 128-130;
Wms. Pers. Prop. 61-63, 16th ed.

(*n*) It is thought that they would be estopped by their conduct from setting up any lien thereon.

ments and undertakings from the owners of any documents retained, and not from their solicitors (*o*).

According to the old practice, a covenant for production of title deeds was usually taken by a separate deed and not contained in the conveyance, unless the deeds to be included therein were recited or noticed in the conveyance (*p*). And it is thought that this practice may still be usefully followed as regards statutory acknowledgments and undertakings (*q*). Where these relate only to documents recited or noticed in the conveyance, it appears more convenient that they should be contained therein. It was always desirable under the old practice, where title deeds were retained and covenanted to be produced, to obtain an endorsement on the leading title deed of a memorandum of the covenant in order to affect all persons claiming thereunder with notice thereof (*r*): but it was considered that this could not be insisted on, if not provided for by special stipulation (*s*). There is not the same necessity for this in the case of a statutory acknowledgment and undertaking, as these are by force of the statute enforceable at law against all persons who have or may come into possession or control of the docu-

Acknowledgment, whether to be given by separate document.

Endorsement of memorandum on conveyance.

(*u*) There appears to be no doubt that a simple bailee of documents has such a possession thereof as enables him to give an effectual statutory acknowledgment and undertaking, if authorized to do so by the bailor. Whether he can do so without the bailor's authority and whether a wrongful possessor of documents can do so are nice questions: but the statute, in the case of an undertaking at least, certainly appears to empower one who has the lawful possession, but only a limited ownership of title deeds (such as a tenant for life), to impose a greater lia-

bility on his successors in interest than he could otherwise impose by virtue of his own interest in the deeds.

(*p*) Sug. V. & P. 450; 1 Dart, V. & P. 554, 5th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 288, n. (*h*), 319, n. (*a*), 4th ed.

(*q*) 1 Dart, V. & P. 554, 5th ed.; 626, 6th ed.; 577, 7th ed.; Davidson's Concise Precedents, 132, n. (*b*), 18th ed.; Wolstenholme's Conveyancing Acts, 49, 8th ed.

(*r*) See above, pp. 687, 688.

(*s*) Davidson, Prec. Conv. vol. i. 591; vol. ii. pt. i. 663 n., 4th ed.

ments (*t*), whether they have or have not notice thereof. Where, however, a purchaser is obliged to rely on his equitable right to the production of any documents of title (*u*), it is very material for him to obtain, if he can, the endorsement of a memorandum of the conveyance to himself on the leading title deed withheld from him; for he might lose this right if the legal right to the documents were to come to a purchaser for value taking in good faith without notice of the equity (*x*). But it is considered that, in the absence of special stipulation, a purchaser has no right to require such an endorsement to be made (*y*).

Expenses of
acknowledg-
ment and
undertaking.

By the Vendor and Purchaser Act, 1874 (*z*), such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself and all necessary parties other than the purchaser. This enactment is now applicable where statutory acknowledgments and undertakings are given instead of covenants.

Liability
created by
acknowledg-
ment or
undertaking.

A statutory acknowledgment only imposes the obligation defined in the Act of producing and delivering copies of the documents included therein; it does not confer any right to damages for loss or destruction of or injury to the documents, from whatever cause arising (*a*). But a statutory undertaking imposes the liability to pay damages for any breach thereof (*b*). It appears that a person entitled to the benefit of a statutory undertaking cannot obtain compensation for

(*t*) Stat. 44 & 45 Vict. c. 41, pt. i. 663 n., 4th ed.
s. 9 (2), (9).

(*u*) Above, p. 688.

(*x*) Above, p. 688.

(*y*) Dart, V. & P. 692, 5th ed.;
783, 6th ed.; 712, 7th ed.;
Davidson, Prec. Conv. vol. ii.

(*z*) Stat. 37 & 38 Vict. c. 78,
s. 2, rule 4.

(*a*) Stat. 44 & 45 Vict. c. 41,
s. 9 (4) — (6).

(*b*) Sect. 9 (9), (10); see above,
p. 689, and n. (*z*).

any depreciation of the market value of his land, which might be supposed to arise from the loss of or injury to the title deeds (*c*). But he may obtain compensation for the expense of additional documents of title, rendered necessary by such loss or injury (*d*).

Since the Conveyancing Act of 1881 (*e*) took effect, it has no longer been the practice to endorse on purchase or other deeds a receipt for any purchase, mortgage or other consideration money therein expressed to have been paid and received: but the receipt clause usually inserted in the body of such deeds is treated as a sufficient acknowledgment of such payment (*f*).

Endorsement
of receipt.

The draft of the conveyance is prepared, as we have seen (*g*), by the purchaser's solicitors. It is then sent to the vendor's solicitors for approval on his behalf; and if there be any other necessary parties to the conveyance besides the vendor (*h*), the draft is of course forwarded to their solicitors also to be settled on their behalf. Here it may be mentioned that when an instrument of assurance drawn by one conveyancer, whether counsel or solicitor, is sent to another to be

Settling the
conveyance.

Conveyancing
etiquette as
to altering

(*c*) *Brown v. Sewell*, 11 Hare, 49.

(*d*) *Horaby v. Matcham*, 16 Sim. 325.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 55, making a receipt in the body of a deed or indorsed thereon sufficient evidence of payment in favour of a purchaser without notice of non-payment.

(*f*) For some time prior to that Act it was the practice to indorse such a receipt; and the absence of an indorsed receipt was considered sufficient to put a purchaser upon inquiry whether the money had in fact been paid, and to entitle him to further evidence of payment. It is thought that at the present time, where a title deed dated before 1882 has a receipt for consideration money

in the body thereof but not indorsed thereon, and comes from the custody in which it would naturally be if the money had been duly paid, it may, in the absence of any other fact tending to prove the contrary, be presumed that the money was paid as stated in the body of the deed. See 3 Preston on Abstracts, 15; *White v. Wakefield*, 7 Sim. 401, 417; *Greenslade v. Dore*, 20 Beav. 284, 292; *Kettlewell v. Watson*, 21 Ch. D. 685, 703; *Rimmer v. Webster*, 1902, 2 Ch. 163, 173, 174; Wms. Real Prop. 193, 194 and n. (*x*), 13th ed.: 615, 627, 628, 21st ed.; Wms. Conv. Stat. 228—230: above, pp. 114, 118, 134, 144, 304.

(*g*) Above, p. 578.

(*h*) Above, p. 613.

drafts settled by other practitioners. settled on behalf of some party, whom the framer of the draft did not represent, the other should of course make all such alterations as he considers necessary to safeguard the interests of his client: but he should not alter the draft further or otherwise than is necessary to effect this end. In short, his alterations should be directed to matters of substance only and not of form; and it is a grave breach of conveyancing etiquette for one practitioner to amend another's draft in any point, on which his client's interests would not really be affected if the instrument were to stand as originally drawn (*i*). When the parties are agreed as to the form of the draft, the purchaser procures it to be engrossed at his own expense (*k*).

Engross-
ment.

Stamps on
conveyance.

The deed of conveyance must of course be duly stamped according to the *ad valorem* duty charged on conveyances on sale by the Stamp Act, 1891 (*l*), as amended by the Finance (1909-10) Act, 1910 (*m*); and unless the conveyance be executed in pursuance of some contract made before the 29th of April, 1910, or be made for transferring on sale a lease of some separate tenement, flat or dwelling being part of a building used for the purpose of separate tenements, flats or dwellings, either the contract or the conveyance must bear the appropriate increment value duty stamp (*n*). Let us first consider the stamping of the deed with the amount of duty charged on conveyances on sale as such. This is the concern of the purchaser; the vendor is under no duty to see that it be done; and the deed may well be stamped after its execution (*o*). The

Increment
value duty
stamp.

Stamp duty
on convey-
ances on
sale.

(*i*) See 1 Dapt. V. & P. 564, 5th ed.; 637, 6th ed.; 589, 7th ed.

(*k*) Ibid. 565, 5th ed.; 638, 6th ed.; 590, 7th ed.

(*l*) See stats. 54 & 55 Vict. c. 39, ss. 14, 54-61, and First Schedule; 58 Vict. c. 16, Pt. II.; Wms. Real Prop. 615, and n. (*p*),

21st ed.; above, p. 28, and n. (*c*).

(*m*) Stat. 10 Edw. VII. c. 8, s. 73.

(*n*) Stat. 10 Edw. VII. c. 8, ss. 1, 4, 11.

(*o*) Conveyances on sale may be stamped, without penalty, within thirty days after their

vendor and his solicitor and conveyancing counsel are, however, concerned to see that all the facts and circumstances affecting the liability of the instrument of conveyance to duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein; for every person who, with intent to defraud the Crown, executes any instrument in which all such facts and circumstances are not so set forth, or being employed or concerned in or about the preparation of any instrument neglects or omits so to set forth therein all such facts and circumstances, incurs a fine of ten pounds (*p*). Under the Stamp Act, 1891, as now amended by the Act of 1910, the duty on conveyances on sale is charged at the rate of one per cent. of the amount or value of the consideration; except where the amount or value of the consideration for the sale does not exceed five hundred pounds *and* the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds (*q*). It is thought that, to bring a case within the terms of this exception, the statement required must be contained in the body of the instrument and not merely endorsed thereon. This is a point of great importance, and must be kept in mind in drafting conveyances on sales for

first execution; or if first executed out of the United Kingdom, within thirty days after they have been first received in the United Kingdom; or if the Commissioners have been required to adjudicate upon the stamp, within fourteen days after notice of the adjudication; see stat. 54 & 55 Vict. c. 39, ss. 12, 13, 15, amended by 58 Vict. c. 16, s. 15.

(*p*) Stat. 54 & 55 Vict. c. 39, s. 5.

q) Stat. 10 Edw. VII. c. 8, s. 73, doubling (save in the excepted cases) the stamp duties imposed on conveyances on sale by the Stamp Act, 1891, stat. 54 & 55 Vict. c. 39, First Schedule. These were 6*d.* for every 5*l.* or fraction thereof up to 25*l.*; 2*s.* 6*d.* for every 25*l.* or fraction thereof up to 300*l.*; and above 300*l.* 5*s.* for every 50*l.* or fraction thereof; and they are still applicable in the excepted cases.

five hundred pounds or less ; as it appears that a deed purporting to carry out such a sale, and stamped at the rate of one-half per cent only (*r*), may be objected to on some subsequent investigation of the title, as insufficiently stamped (*s*), unless it comply exactly with the terms of the exception. The conveyances chargeable with *ad valorem* duty under the Stamp Act, 1891, as above amended, include not only conveyances on sale in the strict sense of the word (*t*), but also all absolute conveyances of any property (*u*) in consideration of the transfer of stock, shares, securities or other chattels personal (*x*), or of a covenant to pay and indemnify against some mortgage or charge on the property (*y*) or to pay a debt or other sum not charged on the property, or of the release of a debt (*z*), or of the grant of a rent-charge or an annuity. That Act contains (besides sect. 59 set out above (*a*)) the following special provisions as to conveyances on sale :—

Meaning of conveyance on sale.

(Sect. 54.) For the purposes of this Act the expression “conveyance on sale” includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale (*b*) thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

How *ad valorem* duty to be calculated in respect of stock and securities.

(Sect. 55 (1).) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security.

(2.) Where the consideration, or any part of the consideration, for

(*r*) See previous note.

(*s*) See above, pp. 45, 46, 130, 174.

(*t*) Above, pp. 1, 266.

(*u*) See *Great Northern Rail. Co. v. Inland Revenue Commrs.*, 1901, 1 K. B. 416, 417.

(*x*) *G. W. Rail. Co. v. Inland Revenue Commrs.*, 1894, 1 Q. B. 507; *Foster v. Inland Revenue Commrs.*, *ibid.* 516; *J. & P. Coats v. Inland Revenue Commrs.*, 1897, 2 Q. B. 423; *Chesterfield Brewery*

Co. v. Inland Revenue Commrs., 1899, 2 Q. B. 7. As to the stamp duty upon an exchange of lands, see stat. 54 & 55 Vict. c. 39, s. 73, and First Schedule.

(*y*) *Bristol v. Inland Revenue Commrs.*, 1901, 2 K. B. 336.

(*z*) *Huntington v. Inland Revenue Commrs.*, 1896, 1 Q. B. 422; *Bristol v. Inland Revenue Commrs.*, *ubi sup.*

(*a*) P. 28, n. (*c*).

(*b*) See notes (*u*), (*x*), above.

a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

(Sect. 56 (1).) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period not exceeding twenty years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount.

How consideration consisting of periodical payments to be charged.

(2.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument (c).

(3.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically during any life or lives, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument.

(4.) Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than ten shillings.

(Sect. 57.) Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (d).

How conveyance in consideration of a debt, &c. to be charged.

(Sect. 58 (1).) Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments (e), the consideration is to be apportioned in such manner as the parties think fit, so that a distinct

Duty on conveyance in separate parcels of property sold for one consideration.

(c) See *Underground Electric Ry., &c., Ltd. v. Inland Revenue Commrs.*, 1905, 1 K. B. 174, 1906, A. C. 21.

(d) See *Bristol v. Inland Revenue Commissioners*, 1901, 2 K. B. 336.

(e) See above, p. 618.

On conveyance in separate parcels of property bought for one consideration by or for several persons.

Where there are several instruments of conveyance for completing one sale.

Sub-sale by purchaser before conveyance.

Conveyance in separate parcels after a sub-sale.

Where sub-purchaser has taken a conveyance of the purchaser's interest.

As to sale of annuity or right not before in existence.

consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration.

(2.) Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified.

(3.) Where there are several instruments of conveyance for completing the purchaser's title to property sold (*f*), the principal instrument of conveyance only is charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument.

(4.) Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser (*g*), the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser.

(5.) Where a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration.

(6.) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him (*h*), and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty.

(Sect. 60.) Where upon the sale of any annuity or other right not before in existence (*i*) such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is

(*f*) See above, pp. 618 - 620.

(*g*) See above, p. 616.

(*h*) See above, p. 28, n. (*e*).

(*i*) See above, p. 434.

to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.

(Sect. 61 (1).) In the cases hereinafter specified the principal instrument is to be ascertained in the following manner:—

- (a) Where any copyhold or customary estate is conveyed by a deed (*k*), no surrender being necessary, the deed is to be deemed the principal instrument:
- (b) In other cases of copyhold or customary estates (*k*), the surrender or grant, if made out of Court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in Court, is to be deemed the principal instrument (*l*):
- (c) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

(2.) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

Conveyance by several instruments.

Copyholds conveyed by deed.

By surrender.

As we have seen (*m*), on the sale of any equitable interest in lands the contract for sale may be stamped with the *ad valorem* duty, and in that case the conveyance is not chargeable with any further stamp duty. On the sale of an equity of redemption, as the purchaser takes upon himself the burden of the mortgage debt (*n*), the conveyance is chargeable with *ad valorem* duty, not only on the price, but also on the total amount due for principal and interest on the mortgage debt (*o*). So a conveyance of the equity of redemption by a mortgagor to a mortgagee, in consideration of the release of the mortgage debt, is chargeable as a conveyance on sale with stamp duty on the amount of the debt (*p*). And a conveyance executed by a mortgagor in pursuance of an order for foreclosure absolute, obtained by an

Sale of an equitable interest in lands.

Of equity of redemption.

(*k*) Above, pp. 235, 346 *sq.*

(*l*) See also sects. 65–68. No stamp duty is chargeable on an admittance: Elton on Copyholds, 282, 339, n. (*b*).

(*m*) Above, p. 28, n. (*e*).

(*n*) Above, p. 672.

(*o*) See sect. 57, above, p. 699, and below, p. 702, n. (*q*).

(*p*) See *Bristol v. Inland Revenue Commrs.*, 1901, 2 K. B. 336, and next note.

Foreclosure
orders.

equitable mortgagee and directing the mortgagor to execute a conveyance of the legal estate, has been held chargeable with stamp duty as a conveyance on sale (*q*). It was formerly supposed that an order for foreclosure absolute obtained by a legal mortgagee was not an order transferring an estate or interest in property and so chargeable with *ad valorem* stamp duty under the Stamp Act, 1891 (*r*). But by the Finance Act, 1898 (*s*), it was declared that the definition of conveyance on sale in the Stamp Act, 1891 (*t*), should include decrees or orders for or having the effect of an order for foreclosure; and it was provided that, where *ad valorem* stamp duty is paid upon such decree or order, any conveyance following upon such decree or order shall be exempt from the *ad valorem* duty. And it has since been held that this enactment is retrospective, and further considered that orders for foreclosure absolute obtained by a legal mortgagee were chargeable with *ad valorem* stamp duty under the Act of 1891 (*u*). As we have seen (*x*), not only a conveyance by deed, but any instrument or order of any Court may be chargeable with stamp duty as a conveyance on sale. Vesting orders (*y*) may therefore be so chargeable; and so may Acts of Parliament (*z*). The stamp duty on conveyances

(*q*) *Huntington v. Inland Revenue Commrs.*, 1896, 1 Q. B. 422.

(*r*) See above, p. 698; *Re Locell and Collard's Contract*, 1907, 1 Ch. 249, 255.

(*s*) Stat. 61 & 62 Vict. c. 10, s. 6.

(*t*) Stat. 54 & 55 Vict. c. 59, s. 54; above, p. 698.

(*u*) *Re Locell and Collard's Contract*, 1907, 1 Ch. 249.

(*x*) Sect. 54, above, p. 698. By sect. 122, "instrument" includes every written document.

(*y*) See above, pp. 536, 561.

(*z*) See *G. W. Rail. Co. v. Inland Revenue Commrs.*, 1894, 1

Q. B. 507. Under the Finance Act, 1895 (stat. 58 Vict. c. 16), s. 12, where after the passing thereof by virtue of any Act of Parliament, whenever passed, any property is vested by way of sale in any person or any person is authorised to purchase property, then in the former case a King's printer's copy of the Act or some instrument relating to the vesting, and in the latter an instrument of conveyance, is to be stamped with the *ad valorem* duty payable upon a conveyance on sale of the property and produced to the Inland Revenue Commissioners.

on sale is chargeable on the value of all property assured by the conveyance; so that where on a sale of land the timber or fixtures is or are sold by valuation (*a*), the amount of the valuation must be stated in the conveyance (*b*). So must the value of the goodwill of a business, where separately valued and assigned by the conveyance of any land or chattels forming part of the assets of the business, and also where it is separately assigned (*c*). A conveyance of land in consideration of a rent-charge to issue thereout (*d*) is chargeable as prescribed above in the case of periodical payments (*e*); and if a lump sum be further payable immediately as part of the consideration, *ad valorem* duty is chargeable on that also. But on a sale of land subject to an existing rent-charge or any kind of rent, as rent service on the sale of leaseholds, the payment of the rent is held not to form any part of the consideration for the purposes of stamp duty, notwithstanding that the purchaser covenant to indemnify the vendor against such payment (*f*); and this is so where part of land subject to one entire rent is sold and the rent is apportioned as between the parties to the sale (*g*). By the Finance Act, 1900 (*h*), a conveyance of sale made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration of a covenant by the purchaser to make, or of his having previously made, any substantial improvement of or addition to the property conveyed to him, or of any covenant relating to the subject-matter of the conveyance, is not chargeable, and shall be deemed not to have been chargeable, with any duty in respect of such further consideration. So where land is conveyed in

Conveyance
in considera-
tion of a
rent-charge.

a Above, p. 60.

b 2 Dart, V. & P. 697, 5th ed.; 788, 6th ed.

c See *Patter v. Inland Revenue Commrs.*, 10 Ex. 117; cases cited above, pp. 29, 30.

d Above, pp. 672 *et seq.*

e Above, p. 699.

f Above, pp. 667, 672.

g *Swaine v. Inland Revenue Commrs.*, 1900, 1 Q. B. 172.

h Stat. 63 Viet. c. 7, s. 10.

consideration of a rent-charge, and of a covenant to build thereon (*i*), or of the previous erection of buildings thereon, no stamp duty is chargeable in respect of the covenant or improvement.

Where several transactions are carried out by one instrument.

By the Stamp Act, 1891 (*k*), except where express provision to the contrary is made by this or any other Act, an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; and an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations. So that where a conveyance takes effect as upon sale and also as a mortgage (*l*), it is chargeable with stamp duty on each of these transactions (*m*). Where one holding land subject to any kind of incumbrance (*n*) sells the same free from incumbrances and on completion of the sale the land is conveyed to the purchaser by one deed, in which the vendor and the incumbrancers concur to assure their respective interests (*o*), stamp duty is only chargeable as upon a conveyance on sale, notwithstanding that the incumbrancers were no parties to the contract of sale and receive no part of the consideration; for, although as between the incumbrancers and the vendor their conveyance be voluntary, yet as between the conveying parties and the purchaser, the assurance is for one valuable consideration (*p*), and is nothing more than the

(*i*) Above, p. 674.

(*k*) Stat. 54 & 55 Vict. c. 39, s. 1.

(*l*) See above, pp. 624—627.

(*m*) 2 Dart, V. & P. 705, 5th ed.; 796, 6th ed.

(*n*) See above, p. 619.

(*o*) See above, p. 620.

(*p*) Above, p. 636.

conveyance on sale to him of the whole estate contracted for (*q*). But if in a deed of conveyance on sale some interest is also assured, which is outside the transaction of sale, as if an estate in remainder or reversion or subject to some incumbrance were sold, and after the sale but before completion the purchaser were to induce the owner of the particular estate or incumbrance either gratuitously or for value to concur in the conveyance, then the deed would be chargeable with stamp duty, not only as a conveyance on sale, but also in respect of the assurance of the estate or interest not included in the sale (*r*). Where incumbrances are got in by a vendor prior to conveyance to the purchaser (*s*), the deeds of reconveyance, release or other assurance are chargeable with the stamp duty payable on such transactions under the Stamp Act, 1891 (*t*), and the duty must of course be borne by the vendor (*s*). Where any instrument is duly stamped, as for its leading and principal object, this stamp covers everything accessory to that object (*u*). The inclusion in a deed of conveyance of an acknowledgment or undertaking for production or safe custody of any of the title deeds does not therefore involve the payment of any additional stamp duty (*v*). The purchaser must bear the expense of stamping the conveyance with the amount of duty charged in respect of conveyances on sale, as such (*y*). Expense of stamping.

By the Finance (1909-10) Act, 1910 (*z*), a stamp duty (*u*), called Increment Value Duty, and levied on Increment Value Duty.

(*q*) See Sug. V. & P. 570; 2 Dart, V. & P. 704, 5th ed.; 795, 6th ed.

(*r*) See Alpe's Stamp Duties, 124, 8th ed.

(*s*) See above, p. 618.

(*t*) Above, pp. 699, 700.

(*u*) *Linnaeus, &c. Co. v. Inland*

Revenue Commrs., L. R. 7 Ex. 211, 217.

(*v*) See Sug. V. & P. 571; 2 Dart, V. & P. 706, 5th ed.; 797, 6th ed.

(*y*) Above, pp. 34, 696.

(*z*) Stat. 10 Edw. VII. c. 8, s. 1, passed 29th April, 1910.

(*a*) See s. 3 (6).

Sale of a lease of a separate tenement, flat or dwelling, part of a larger building.

the increment value as defined in the Act (*b*) of any land, was made payable (subject to the exemptions therein mentioned (*c*)), amongst other occasions (*d*), on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land (*e*), in pursuance of any contract made after the commencement of the Act (*f*). But the transfer on sale of any lease of any separate tenement, flat or dwelling, being part of a building used for the purpose of separate tenements, flats or dwellings, is not an occasion on which Incre-

(*b*) See ss. 2, 25—32.

(*c*) See ss. 7 (exempting agricultural land, as defined in s. 41, while it has no higher value than its market value at the time for agricultural purposes only), 8 (as to small houses and properties in their owner's occupation), 9 (as to land used for games or recreation), 10 (as to Crown lands), 35 (exempting land held by rating authorities), 38 (as to land held by a statutory company for the purposes of their undertaking).

(*d*) These (see s. 1) are (1) on the occasion of the grant, in pursuance of any contract made after the commencement of this Act, of any lease (not being a lease for a term of years not exceeding fourteen years) of the land (but see s. 22 as to mining leases); (2) on the occasion of the death of any person dying after the commencement of this Act, where the fee simple of the land or any interest in the land is comprised in the property passing on the death of the deceased within the meaning of ss. 1 and 2, sub-s. (1) (*a*), (*b*), and (*c*), and sub-s. 3 of the Finance Act, 1894 (stat. 57 & 58 Viet. c. 30), as amended by any subsequent enactment; and (3) where the fee simple of the land or any interest in the land is held by any body corporate or by any body unincorporate as defined by s. 12 of the Customs and Inland Revenue Act, 1885 (stat. 48 & 49

Viet. c. 51), in such a manner or on such permanent trusts that the land or interest is not liable to death duties, such periodical occasions as are provided in this Act (see s. 6, and s. 37 as to land held for charitable purposes).

(*e*) By s. 41, in this part of this Act, unless the context otherwise requires, the expression "land" does not include any incorporeal hereditament issuing or granted out of the land; and the expression "interest" in relation to land includes any undivided share in a fee simple in possession and includes a reversion expectant on the determination of a lease, but does not include any other interest in expectancy or an incumbrance as defined by this Act or any fixed charge as defined by this Act or any purely incorporeal hereditament or any leasehold interest under a lease for a term of years not exceeding fourteen years or any tenancy which is, or is deemed to be, subject to statutory conditions under the Land Law (Ireland) Acts; and the expression "fee simple" means the fee simple in possession not subject to any lease, but does not include an undivided share in a fee simple in possession. As to the general meaning of the word *land* in Acts of Parliament, see above, p. 98, n. (*n*).

(*f*) See note (*z*), p. 705, above.

ment Value Duty is to be collected under this Act (*g*). With this exception, however, on any transfer on sale of the fee simple of any land or of any interest in land, Increment Value Duty is to be assessed by the Commissioners of Inland Revenue (*h*) and paid by the transferor (*i*); and it is the duty of the transferor to present to the Commissioners, in accordance with regulations made by them, the instrument by means of which the transfer is effected or agreed to be effected, or reasonable particulars thereof for the purpose of the assessment of duty thereon (*k*). And any such instrument is

(*g*) Sect. 11, excepting also the grant and the passing on death of any such lease from the occasions on which this duty is to be payable.

(*h*) See sect. 96 (2).

(*i*) Sect. 4 (1). By sect. 41, the expression "the transferor" does not include any persons who join

in the execution of the instrument by which the transfer is effected, or agreed to be effected, for the purpose only of conveying any estate vested in them as trustees or incumbrancers, or of acknowledging the receipt of the consideration money, or of giving consent.

(*k*) Sect. 4 (2), also imposing a fine for failure to comply therewith; see s. 4 (5), and the Commissioners' Regulations: W. N. 4th June, 1910. By Regulation 3, if the instrument itself be presented, the presentation should take place, if possible, after execution by the transferor. The instrument must be accompanied either by a copy, or by an abstract such (but containing the further particulars required) as is presented with an instrument lodged for adjudication under s. 12 of the Stamp Act, 1891. The abstract should set out fully, for purposes of identification, the description of the property sold, and if the instrument contains or refers to a plan, a copy of such plan should be furnished. A full statement should be made of any easements or reservations affecting the land, of any covenant restricting its use, and of any agreement or obligation to repair, or to pay outgoings. Any covenant or undertaking or liability to discharge any incumbrance, and any covenant or undertaking to erect buildings or to expend any sums upon the property should be set out in full. If the easement, covenant, &c. is set forth in some other document than the instrument itself, that document should be presented as well. The official form (I. V. D. (A)) of application for an Increment Value Duty stamp, duly filled up and signed, should also be lodged. The official form of abstract (I. V. D. (B)) can be used, if desired. By Regulation 4, the instrument, the abstract and the form I. V. D. (A), when presented, will be retained by the proper officer of the Commissioners for examination, a ticket being given by way of receipt to the person presenting them. By Regulation 5, assuming that the various documents or papers are found on examination to contain the particulars necessary for the purpose of enabling the Commissioners to assess the duty, and that if security has been required (see Regulation 14), such security has been given, the instrument will be impressed with one of

The Increment Value Duty stamps.

not to be deemed duly stamped unless it is stamped either (1) with a stamp denoting that the Increment Value Duty has been assessed and paid, or (2) a stamp denoting that the necessary particulars have been delivered to the Commissioners and security given, where required, for payment of the duty, or (3) with a stamp denoting that no Increment Value Duty was payable on the occasion : but where an instrument is so stamped, it is, notwithstanding any objection relating to the Increment Value Duty, to be deemed to be duly stamped as respects that duty (*l*). Where any agreement for a transfer is so stamped, it is not necessary to stamp any conveyance or assignment made subsequently and in conformity with the agreement, but the Commissioners are required, on application made to them for the purpose, to denote on the conveyance or assignment the amount of duty paid (*m*). If an agreement for a transfer is intended to be followed shortly by an actual conveyance, the Commissioners will not require the agreement, or particulars thereof, to be presented under the Regulations, but will accept the presentation in due course of the actual conveyance, or particulars thereof, as a compliance with the provisions of the Act (*n*).

Increment value duty stamp, when required.

It appears from these enactments and regulations that, after a sale of the fee simple or any interest in land as

the Increment Value Duty stamps, and will be returned on presentation of the ticket after the expiration of the time mentioned therein. By Regulation 11, if the instrument itself be not presented by the transferor for the purpose of the assessment of Increment Value Duty thereon, reasonable particulars thereof in the form of the various documents mentioned in Regulation 3 must be furnished by him ; and a receipt will be given therefor. The form I. V. D. (A) duly filled up should be lodged at the same time. And by Regulation 12, provided the necessary particulars as above have been furnished by the transferor, the appropriate stamp will be impressed at any future date, if the instrument and the receipt for the particulars are lodged for the requisite length of time at the Head Office.

(*l*) Sect. 4 (3) ; and see above, (*n*) Commissioners' Regulations, No. 7.
p. 28, and n. (*e*).

(*m*) Sect. 4 (7).

defined in the Act (*o*), either the contract or the conveyance must be stamped with the appropriate Increment Value Duty stamp whenever the making of the conveyance is *an occasion* on which Increment Value Duty is, or would but for the nature of the property conveyed be, payable: but that the contract or conveyance need not be so stamped where the conveyance does not give rise to such an occasion, that is to say, where it is made in pursuance of a contract made before the commencement of the Act (*p*) or to effect the transfer on sale of a lease of some such separate tenement, flat or dwelling as above mentioned (*q*). But it appears that, on sale after the Act of some property, which is merely exempted from being charged with the duty, such as agricultural land or small houses or properties in their owners' occupation (*r*), the contract or conveyance must be stamped with the Increment Value Duty stamp appropriate to the case (*s*). The vendor is liable to pay the Increment Value Duty; and he is bound to present to the Commissioners either the contract or the conveyance (accompanied in each case with the further information required) or else reasonable particulars thereof in the required form for the purpose of the assessment of the duty (*t*). But it lies in his option which of these alternatives he will select. The most convenient course for him to choose seems to be to present the required particulars, instead of parting with the possession of the contract or the engrossment of the conveyance; as this will enable him to tender to the purchaser at the time for completion the conveyance executed by all necessary parties, together with the official receipt for the particulars presented (*u*). If he do this, it appears that he will

The vendor's
duty in this
respect.

(*o*) See above, p. 706, n. (*e*).

(*p*) Above, p. 705, and n. (*z*).

(*q*) See above, p. 706; Commissioners' Regulations, No. 1.

(*r*) See above, p. 706, n. (*c*);

Commissioners' Regulations,
No. 10.

(*s*) See above, p. 708.

(*t*) Above, p. 707, and n. (*k*).

The purchaser's concern.

Whether the contract or the conveyance should be stamped with the above stamp.

Where it seems advisable to stamp the contract.

have discharged his duty to the purchaser under the contract, and it will be the purchaser's concern to see that the contract or the conveyance be duly impressed with the appropriate Increment Value Duty stamp (*u*). But the purchaser is in no way concerned to see that the duty in question be paid, for it does not appear to be charged, if not paid, on the land sold (*x*). It appears that in the ordinary case of a contract of sale of land to be followed by a conveyance, either the contract or the conveyance alone may be stamped with the Increment Value Duty stamp, or the contract may be so stamped and the conveyance may be stamped with a stamp denoting the amount of duty paid (*y*). For the purchaser, the most convenient course will usually be to have the conveyance alone stamped with the Increment Value Duty stamp; since it is generally desired, as we have seen (*z*), to avoid all reference on the face of conveyances to any written contract which preceded them. If however the contract should contain any stipulation giving rise to some obligation which will not be discharged by conveyance and payment of the price (*a*)—for example, an express stipulation providing for compensation for errors of description (*b*), or a stipulation that the vendor shall build a wall on adjoining land of his own—it would seem advisable to have the contract impressed with the appropriate Increment Value Duty stamp; for it is at least a question whether the contract would, after the execution of the conveyance, be sufficiently stamped without it (*c*).

(*u*) See above, pp. 696, 705.

(*x*) See stat. 10 Edw. VII. c. 8, s. 4 (4), making the duty assessed a Crown debt due from the transferor. But where Increment Value Duty is payable on the death of any person, it seems to be charged like estate duty on any property liable to the duty

and not passing to the executor or administrator as such; see s. 5; below, chapter on the Death Duties in Vol. II.

(*y*) See above, p. 708.

(*z*) Above, p. 629.

(*a*) See below, Chap. XVIII. § 1.

(*b*) Above, p. 66.

(*c*) See stat. 10 Edw. VII. c. 8, s. 4 (3), stated above, p. 708; and note that "such instrument" refers to the instrument by means of

It does not appear to be strictly necessary, on a sale by auction, to make any stipulation for the vendor's protection in respect of the Increment Value Duty stamp. If he present to the Commissioners the necessary particulars for assessment of the duty, and tender to the purchaser at the time for completion the conveyance executed by all necessary parties and the official receipt for the particulars presented (*d*), it is thought that the purchaser will have no right to reject such tender and to refuse payment of the price on the ground that the contract or the conveyance bears no Increment Value Duty stamp (*e*). To avoid all misunderstanding, however, it seems advisable in ordinary cases to stipulate expressly that the vendor will, on or before delivery to

Conditions of
sale as to the
Increment
Value Duty
stamp.

which the transfer is effected or *agreed to be effected*; see sect. 4 (2), stated above, p. 707. Note also that the Act does not precisely say that the contract need not be stamped with an Increment Value Duty stamp, where the conveyance is so stamped, though it makes express provision for the converse case; above, p. 708. On the other hand, where there is a contract of sale followed by a conveyance, it appears that the Act will be satisfied if the conveyance alone be stamped with such a stamp; and Regulation 7 assumes that this is the case; above, p. 708. It is submitted that a contract for the sale of land is in its inception sufficiently stamped, if stamped as required by the Stamp Act, 1891; above, p. 28, and n. (*e*); and further that, where the contract has not been completed by conveyance, an Increment Value Duty stamp is not necessary to make the contract available as evidence in any proceedings either to enforce it specifically or to recover damages for its breach. The mere sale of land does not seem to be an occasion on which such duty is payable, as the duty is expressly charged on the occasion of "any transfer on sale"; above, pp. 706, 707; and this expression seems to point to the conveyance completing the contract. The vendor, moreover, is only bound to present the required instrument or particulars thereof on the occasion of any transfer on sale; above, p. 707. And it appears that in general an Increment Value Duty stamp is only required for instruments evidencing some transaction, which is an occasion for the payment of such duty; see above, p. 708. Besides this, in any case where Increment Value Duty has been paid, but the transaction, in respect of which the duty was paid, is subsequently not carried into execution, the duty is to be returned; stat. 10 Edw. VII. c. 8, s. 4 (6). This seems to show that in any proceedings for breach (before conveyance) of the contract, no Increment Value Duty stamp can be required on the contract. And it is submitted that any proceedings for specific performance must necessarily be brought on the assumption that the contract has not been completed by conveyance, and therefore that no occasion for payment of Increment Value Duty has yet arisen.

(*d*) Above, pp. 707, and n. (*k*), 709.

(*e*) See above, p. 710.

him of the engrossment of the conveyance, present to the Commissioners of Inland Revenue the necessary particulars for assessment of the Increment Value Duty to become payable on the completion of sale and apply to have the conveyance stamped with the appropriate Increment Value Duty stamp, and the purchaser shall, on delivery to him of the official receipt for such particulars, complete the purchase as provided by the contract, and shall thereafter at his own expense procure the conveyance to be stamped with the appropriate Increment Value Duty stamp (*f*). If however the contract should contain some stipulation which the vendor may possibly require to enforce after completion, it would appear advisable to provide specially in the conditions of sale that the contract shall be impressed with such a stamp (*g*). It is thought that any condition for making the purchaser bear the Increment Value Duty to become payable on completion of the sale is likely to be depreciatory and should be avoided.

§ 4.—*Of the Adjustment of Accounts.*

If the purchase should be completed at the proper time for completion, the purchase money will be payable without interest (*h*), and the only matter in respect of which any adjustment of accounts may be necessary is the apportionment of the rents or profits and the outgoings (*i*). In practice, however, it is exceptional for a sale of land to be completed at the proper time; so that an account has usually to be taken of what is chargeable against the vendor on account of rents and profits received by him since the proper time for completion and what is due to him for

(*f*) See Appendix A, below.

(*g*) See above, p. 710: Appendix A, below.

(*h*) Above, pp. 26, 46, 50, 57—60.

(*i*) Above, pp. 50, 67, 517, 523.

interest on the purchase money (*k*). Besides this, the amount of the purchase money may in some cases be diminished or increased by a valid claim for compensation on the part of either purchaser or vendor. We will consider each of these matters in turn.

First, as to the apportionment of rent. Where the lands sold or any part of them are let, and the time for completion of the sale does not fall on some rent-day, we have seen that the vendor is either by law or express stipulation entitled to an apportioned part of the rent accrued due since the last rent-day (*l*). He cannot, however (except by express stipulation), require the purchaser to pay this apportioned part of the rent to him on completion: but he must wait until the entire rent for the current quarter, half-year, or other period, for which the rent was reserved, has become due and payable; when (if the purchase has been completed) the purchaser will be entitled to recover the entire rent from the tenant (*m*) and the vendor to exact payment of his apportioned part from the purchaser (*n*). For this reason it is not uncommonly provided in conditions of sale by auction that the purchaser shall on completion pay to the vendor the proportion due to him of the current rents and shall retain the whole amount of such rents for his own benefit (*o*). As to the outgoings, where these are apportionable between the parties and payable in advance, as rates and taxes usually are (*p*),

Apportionment of rent on completion.

Apportionment of outgoings.

(*k*) Above, p. 515.

(*l*) Above, pp. 50, 67.

(*m*) Above, p. 401.

(*n*) This is so provided by the Apportionment Act, 1870 (stat. 33 & 34 Vict. c. 35, ss. 3, 4, in the absence of express stipulation. And it is thought that the same law applies where the contract of sale contains an express stipulation for apportionment of the rents: see 1 Davidson, *Proc.*

Conv. 666, 4th ed., where the special condition would have been unnecessary if this were not the law; and cf. *Baresh v. Tagg*, 1900, 1 Ch. 231, 235.

(*o*) See Appendix A, below.

(*p*) Above, p. 523. Before the year 1910, the only taxes (other than the death duties) payable in respect of land were land tax, property or income tax and inhabited house duty: Steph.

the vendor having paid any such outgoings before the time for completion is entitled to be recouped by the purchaser to the extent of the proportion attributable to the latter. And of apportionable outgoings, which are not payable in advance (such as ground rent or tithe rent-charge), and will become payable after the proper time for completion, it is thought that the purchaser is entitled to claim that the proportion, which ought to be

Comm. ii. 589—595, 608—610, 6th ed. These are all annual charges and, if payable pending completion of a sale of the property, in respect of which they arise, they are apportionable between the vendor and the purchaser under the usual stipulation for apportionment of the outgoings; see above, p. 523 and note (s). The Finance (1909-10) Act, 1910 (stat. 10 Edw. VII. c. 8), besides imposing Increment Value Duty on the occasions above mentioned (pp. 705, 706, and n. (d)), imposed three other new taxes in respect of land, called Reversion Duty (above, p. 401), Undeveloped Land Duty and Mineral Rights Duty. Reversion Duty is payable by the person, who is entitled to the reversion at the time of the determination of a lease, on the ceasing of which the duty becomes payable; see ss. 12—15, 41. And it is thought that, where the reversion on such a lease is sold and the lease determines at any time before completion, the purchaser ought in all cases to bear the whole of the Reversion Duty as being the person actually entitled to the benefit accruing from such determination; see above, pp. 401, 504—508. If this be the right rule, it follows that on a sale of the reversion to the lessee, the Reversion Duty, which will arise on the merger of the term (see above, pp. 367, 368), should be paid by the purchaser. Undeveloped Land Duty is a yearly tax in respect of the site value of undeveloped land (see ss. 16—19,

25); but it appears to be payable by the person, who is the owner, meaning the person entitled in possession to the rents and profits, of the land at the time when the duty becomes payable, and it is to be borne by that owner notwithstanding any contract to the contrary; see ss. 19, 41. It seems therefore that, if such duty become payable pending completion of a contract of sale of the land, in respect whereof it is charged, it will fall entirely upon the party then entitled to the profits and bound to discharge the outgoings, and will not be apportionable under any express stipulation in the contract; see above, pp. 49, 50, 520—523. Mineral Rights Duty is a yearly tax on the rental value of all rights to work minerals and of all mineral wayleaves, and is payable by the proprietor of the minerals, where he is working them, and in any other case by the immediate lessor of the working lessee. As between such lessor and lessee, the duty is to be borne by the lessor, notwithstanding any contract to the contrary, whether made before or after the Act; see ss. 20—24, 41. It appears that if any such duty should become payable pending completion of a sale of the land, in respect whereof it arises, it would be apportionable between the vendor and the purchaser under the usual stipulation for apportionment of the outgoings; see above, p. 523, and n. (s).

borne by the vendor, shall be allowed in account and deducted from the purchase money on completion. This certainly appears to be so, where the vendor has expressly agreed to discharge or to clear the outgoings (*q*). And it is thought that upon a sale by open contract the vendor incurs the like liability to discharge the outgoings (*r*), and must equally clear off on completion his proportion of any outgoings which are apportionable by law and not payable until after the time for completion. As we have seen (*s*), where any outgoings, which are not apportionable, become charged upon the property sold before the time for completion, the vendor is bound, in the absence of stipulation to the contrary, to discharge them before completion, although they may not become payable until after completion. In such cases, if the amount of the vendor's liability be exactly ascertained before the date of actual completion, he must either discharge the outgoing himself or allow the amount to be set off against an equal part of the purchase money (*t*). If the liability be not exactly ascertained before the time for completion, as where a charge has been created under the Private Street Works Act, 1892, but no final apportionment of expenses made, then, as the vendor cannot make a good title to the property sold as being free from incumbrances while the charge continues to subsist (*u*), the purchaser may, it is thought, refuse to complete without some substantial guarantee that the vendor will duly perform his obligation in this behalf; as that part of the purchase money sufficient to satisfy the incumbrance shall be deposited in their joint names until the charge shall have been paid off.

(*q*) See *Lawes v. Gibson*, L. R. 1 Eq. 135; above, pp. 67, 74, 523.

(*r*) Above, p. 50.

(*s*) Above, pp. 50, 520 *sq.*

(*t*) See *Re Bettsworth and Richer*, 37 Ch. D. 535.

(*u*) See *Stack v. Meakin*, 1900, 1 Ch. 683; above, p. 521.

Apportion-
ment of land
tax and tithe
rent-charge.

Sale of land
subject to a
rent attaching
thereon and
on other land.

Here it may be mentioned that when a part of lands rated or charged together for the purposes of land tax or tithe rent-charge is sold, the tax or rent-charge may be apportioned (*x*): but as land tax and tithe rent-charge are not incumbrances (*y*), it does not appear that it is the vendor's duty to procure this to be done; the purchaser must see to it himself after completion (*z*). So also the purchaser must see for himself after completion that the property sold is separately rated for the purposes of imperial or local taxation. But when the land sold is subject to some incumbrance charged thereon and on other lands as well, such as a rent reserved out of the entirety of leaseholds sold in lots or a rent-charge issuing out of the land sold and other land, the charge is of course, in the absence of stipulation to the contrary, an objection to the title (*a*); and if the vendor should have sold the land as being subject only to a part, proportionate to its value, of the rent or other charge, he must procure the same to be legally apportioned (*b*), or he cannot enforce the contract. In such cases, therefore, as a legal apportionment cannot generally be made by consent of the vendor and purchaser alone, it is usual for the vendor to make special stipulations exonerating him from the obligation of procuring a legal apportionment and providing for the incidence of the charge as between the parties to the

(*x*) See stats. 42 Geo. III. c. 116, s. 35, as to land tax; 5 & 6 Vict. c. 54, s. 14; 23 & 24 Vict. c. 93, s. 11, as to tithe rent-charge.

(*y*) Above, p. 176.

(*z*) See *Re Ebsworth and Tidy*, 12 Ch. D. 23. If this were not so, special stipulations would be required on every sale of freeholds in lots: but it is not considered that these are necessary, except where the vendor represents in the particulars or agreement for sale that the lots sold

are each subject to particular sums payable in respect thereof for land tax and tithe rent-charge. In this case, he would, in the absence of stipulation to the contrary, be bound to procure a legal apportionment, if the whole of the lots were rated or charged together for these purposes. See 1 Davidson, *Prec. Conv.* 616, 622, 689, 4th ed.; 1 Key & Elph. *Prec. Conv.* 310, 8th ed.

(*a*) Above, pp. 167, 176, 177, 361-363.

(*b*) Above, pp. 363, 405, n. (*n*).

sale (*c*). Where the reversion of part of lands let on lease at one entire rent is sold, the vendor should stipulate that the purchaser will be entitled to a certain yearly rent (stating the amount) as an apportioned part of the entire rent, and that the consent of the tenant to this apportionment (*d*) shall not be required (*e*). If the vendor should represent that the land sold were let at the rent stated, without mentioning that this was only an estimated part of a larger rent intended to be apportioned, he would be bound to procure a legal apportionment of the rent; and further, if in such case the land were sold with the benefit of a condition of re-entry on breach of covenant, and this condition would be destroyed by severance of the reversion (*f*), he would not be enabled to enforce the contract for sale (*g*).

Sale of reversion of part of land let at one rent.

The rules respecting the purchaser's liability to pay interest on the unpaid purchase money have been already stated. As we have seen (*h*), this obligation arises either by implication of law or express stipulation at the time when the purchaser acquires the right to enter into possession or receipt of the rents and profits of the property sold; the principle being that enjoyment of the fruits of the contract by the purchaser ought only to be had on condition of payment of the price, and that if payment be deferred, interest should be chargeable (*i*). In this respect the provisions implied by law in an open contract are far more equitable than those of the usual express stipulation made on London sales by auction, which is grossly

Purchaser's liability to pay interest.

Under an open contract.

(*c*) See 1 Dart, V. & P. 130, 131, 5th ed.; 147, 6th ed.; 143, 7th ed.; 1 Davidson, Prec. Conv. 544, 684 *sq.*, 699 *sq.*, 4th ed.; 1 Key & Elph. Prec. Conv. 293 and n. (*d*), 333 *sq.*, 8th ed.; above, pp. 81, 363.

(*d*) See above, p. 405, n. (*n*).

(*e*) 1 Dart, V. & P. 131, 5th

ed.; 147, 6th ed.; 143, 7th ed.; 1 Davidson, Prec. Conv. 546, 547, 4th ed.; above, p. 81.

(*f*) Above, p. 405.

(*g*) See *Walter v. Maunde*, 1 J. & W. 181.

(*h*) Above, pp. 50, 60, 67, 515.

(*i*) Above, p. 50, n. (*a*).

unfair to purchasers and frequently works great hardship (*k*). Thus, under an open contract, where the vendor is in possession, the purchaser is only liable to pay interest, if there be delay in completion, from the time when he may safely take possession, that is, when a good title has been shown (*l*); and this is the case, although a day be fixed for completion, and owing to delay attributable to the state of the title, or otherwise to the vendor, a good title is not shown until after that day (*m*). And if the purchaser be in possession at the time of the contract for sale, or actually enter into possession afterwards, but before completion, or if the property sold be of such a nature that the enjoyment thereof necessarily runs from the time of sale, as in the case of a remainder expectant on a life estate returning no rent (*n*), then interest is payable from the time when actual possession or enjoyment by the purchaser as such so commenced, that is, from the date of the contract for sale or actual entry into possession (*o*). Then under an open contract, if there be delay in completion which is attributable to the vendor, the purchaser may, by appropriating his money to the purchase and giving to the vendor notice of such appropriation, relieve himself of the liability to pay any greater interest thereon than such, if any, as is allowed upon such appropriation. Though he cannot escape his regular liability to pay interest by making such appropriation, if there be delay in completion which is attributable to himself (*p*). But under the usual stipulation for payment of interest in case the contract shall not be completed on the appointed

Under the
stipulation
usual on
London sales.

(*k*) See above, pp. 67, 68, 75, and n. (*b*), 85.

(*l*) Above, pp. 26, 46, 50.

(*m*) *Jones v. Mudd*, 4 Russ. 118; above, p. 60; *Re Highett and Bird's Contract*, 1902, 2 Ch. 214, 217 (which appears to be quite right in this respect; see above, p. 354).

(*n*) Above, pp. 408, 576.

(*o*) *Expte. Manning*, 2 P. W. 410; *Fludyer v. Cocker*, 12 Ves. 25; *A.-G. v. Christchurch*, 13 Sim. 214; 2 Dart, V. & P. 629, 630, 5th ed.; 711, 6th ed.; 652, 653, 7th ed.

(*p*) Above, p. 51.

day from any cause whatever, or from any cause whatever other than the wilful default of the vendor (*q*), the purchaser must pay interest at the rate agreed upon (though far exceeding the return derived from the rents and profits), if there be delay in completion arising from the state of the title, a cause which would otherwise be attributable to the vendor (*r*). And the purchaser cannot, according to the better opinion, divest himself of this liability by appropriating his money to the purchase (*s*). The ground on which the law has been so established is that the purchaser having chosen to enter into such a stringent agreement must abide by its terms, and that owing to the difficulties attendant on making out a title to land, delays so caused cannot be ascribed to the vendor's wilful default. Where the contract is to pay interest, if from any cause whatever the contract be not completed on the appointed day, it is considered that the purchaser cannot escape the express obligation so undertaken unless the delay be caused by the vendor's vexatious conduct, dealing in bad faith, or gross negligence (*t*). Where the purchaser has agreed to pay interest if completion be delayed from any cause whatever other than the vendor's wilful default, he must show that the vendor has committed some wilful default within the meaning of the clause, and must further prove that such default was the effective cause of the delay (*u*). As we have seen (*x*), the late Lord Bowen remarked upon the futility of attempting to formulate an exact definition of wilful default which would cover all cases, whilst at the same time he

Contract to pay interest except on vendor's wilful default.

(*q*) Above, pp. 67, 68.

(*r*) *Shewen v. Shakspear*, 5 De G. M. & G. 517; *Williams v. Glendon*, L. R. 1 Ch. 200; *Re Mayor of London and Tabbs*, 1894, 2 Ch. 524; *Bennett v. Stone*, 1903, 1 Ch. 509, 516, 520, 525; *Re Bagley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648, 654.

(*s*) Above, p. 68.

(*t*) Above, p. 67.

(*u*) See *Re Mayor of London and Tabbs' Contract*, 1894, 2 Ch. 524; *Bennett v. Stone*, 1903, 1 Ch. 509; *Re Bagley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648, 654.

(*x*) Above, p. 68, and n. (3).

ascribed to each of these words a particular meaning. And his explanation of this term has been religiously adopted in subsequent cases, but has hardly proved a satisfactory guide (*y*). The particular acts or omissions which have been held to fall within or without the expression "wilful default" have been already stated (*z*); and as we have seen, in the last of these cases four judges were divided equally in opinion upon the question, whether it is wilful default for a vendor to insist mistakenly, but in apparent honesty, upon an unreasonable contention with respect to the form of the conveyance (*a*). The further point above alluded to, that the purchaser must prove that the vendor's wilful default (where it exists) is the effective cause of the delay, is illustrated by the cases of *Re Mayor of London and Tubbs' Contract* and *Bennett v. Stone* already cited (*b*). In the first of these, it was considered by the whole Court that, even if there were wilful default by the vendor—as to which they differed in opinion—the purchaser could not escape liability to pay interest, if the delay were in truth caused by his own conduct in making voluntary requisitions and his inability to find the purchase money. And in the latter case, three judges out of four held that, if the vendor were in wilful default, yet the purchaser was not on that account released from his obligation to pay interest, where the real cause of the delay was his own inability

(*y*) See *Re Bayley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648, 657—664.

(*z*) Above, p. 68, n. (*s*).

(*a*) *Bennett v. Stone*, 1902, 1 Ch. 226, 1903, 1 Ch. 509. The purchaser was by the contract entitled to the benefit of certain covenants entered into with the vendors by a third party. The purchaser required that the benefit of these covenants should be expressly conveyed to him.

The vendors would only agree to this with the addition of the words "so far as they are now at law or in equity entitled to assign the benefit of these covenants without thereby warranting that such covenants are now enforceable by their assigns." See above, pp. 645, 652; and cf. *Re Bayley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648.

(*b*) Above, pp. 68, n. (*s*).

to provide the purchase money. Where a purchaser had agreed to pay interest if from any cause whatever other than "the default" of the vendor the sale were not completed on the day fixed, and completion was delayed on account of an objection to the title, which was not obviously apparent on the face of the title deeds and was not known to the vendor at the time of sale, Lord Bowen's explanation of the meaning of *default* (c) was adopted, and it was held that the purchaser was not excused from paying interest, for the vendor had not failed to do something which he ought reasonably to have done (d). Where the contract is that if completion be delayed from any cause whatever "the purchaser in default" shall pay interest, he is not obliged to pay interest if there be delay arising from the state of the title or otherwise attributable to the vendor (e). Where there was in effect an express contract to pay interest in the case of delay in completion, unless it should arise from some other cause than the neglect or default of the purchaser, and delay was caused by the purchaser making a requisition, which on appeal to the House of Lords was held to be untenable, it was considered that the purchaser was in default in insisting on such a requisition, and must pay interest accordingly (f).

To pay except on vendor's default.

Purchaser in default to pay interest.

The various items which may be charged in account against or in favour of a vendor remaining in possession after the time when interest on the purchase money has become payable, have been stated in the preceding chapter (g) ; where we have also explained what claims

Items chargeable against or for vendor.

(c) Above, p. 68, n. (s).
 (d) *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211.

(e) *Denning v. Henderson*, 1

De G. & Sm. 689; *Jones v. Gardiner*, 1902, 1 Ch. 191.

(f) *Re Bayley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648.

(g) Above, pp. 515, 517-523.

Deterioration of the property. may be made against the vendor for deterioration of the property sold (*h*).

Compensation for errors of description. The only case in which the adjustment of a claim for compensation is an act done in pursuance of the contract for sale is where an express agreement to make or allow compensation for errors of description forms part of that contract (*i*). In all other cases a party claiming compensation is really seeking, not to carry out the contract as it stands, but to enforce its performance with a variation. It will be convenient, however, to treat in this place of these cases as well; since any claim for compensation will usually be allowed and adjusted before completion and without litigation, if the claimant can establish a clear right to enforce specific performance of the contract with compensation. And in all cases of innocent misdescription it is essential that the claim for compensation should be made before completion, if the contract contain no express agreement to make compensation; for, except in the case of such an express agreement, the claim cannot afterwards be enforced (*k*).

Claims to compensation under an open contract. The position of the parties to an open contract with respect to claims for compensation has been already indicated (*l*). Any misdescription of the property sold must result in a breach of the contract at law; for in such case the vendor cannot discharge his obligation of producing a property corresponding with that which he has purported to sell (*l*); and he is bound at law to produce a property answering exactly to that described in the contract, no difference between substantial and insubstantial errors being admitted (*m*). But in equity

(*h*) Above, pp. 512—515.

(*i*) Above, p. 65.

(*k*) Above, pp. 65, 610.

(*l*) Above, p. 43.

(*m*) See *Mortlock v. Buller*, 10 Ves. 292, 306; *Halsey v. Grant*, 13 Ves. 73, 77; *Clermont v. Tasburgh*, 1 J. & W. 112, 120; 2

it is held that, where there is an insubstantial error innocently made in the description of the property sold, the vendor may nevertheless enforce the specific performance of the contract, giving compensation for the deficiency; and this is the case whether the deficiency be of acreage or quantity, or be of right, as in the case of a quit rent not mentioned in the particulars, or where a very small part of a property described as freehold is copyhold or leasehold (*n*). This relief, however, will only be afforded in the case of an error made in entire innocence and good faith. It will be refused if the misdescription amount to a wrongful misrepresentation (*o*). And if the mistake occurred in any point really material to the enjoyment promised by the description in the contract, the vendor cannot oblige the purchaser to perform the contract, whether the misdescription were innocently made or not, and whether it related to the quantity or situation of the land sold, or to the vendor's tenure, estate or right (*p*). As we have seen (*q*), compensation is not payable for patent defects—those which are discoverable by an inspection of the property sold—but may well be claimed for defects which are latent and interfere with the enjoyment promised by the contract; and will not be allowed for defects, of which the purchaser had notice when he bought. It is thought that the doctrine

Dart, V. & P. 956, 957, 5th ed.; 1083, 1084, 6th ed.; 998, 7th ed.; above, pp. 43, 44.

(*n*) *Calcraft v. Roebuck*, 1 Ves. jun. 221; *Halsey v. Grant*, 13 Ves. 73; *Esdaile v. Stephenson*, 1 S. & S. 122; *Scott v. Hanson*, 1 R. & M. 128; *King v. Wilson*, 6 Beav. 124; *Powell v. Elliot*, L. R. 10 Ch. 424; above, p. 176.

(*o*) *Clermont v. Tasburgh*, 1 J. & W. 112, 120; *Price v. Macaulay*, 2 De G. M. & G. 339; *Dimmock v. Hallett*, L. R. 2 Ch. 21, 28, 31; *Re Terry and White's Contract*,

32 Ch. D. 14, 29.

(*p*) See *Drewe v. Hanson*, 6 Ves. 675, 679; *Halsey v. Grant*, 13 Ves. 73, 78, 79; *Binks v. Rokoby*, 2 Swanst. 222, 225; *Peers v. Lambert*, 7 Beav. 546; *Fry, Sp. Perf.* 548–557, 3rd ed.; *Re Arnold*, 14 Ch. D. 270; *Jacobs v. Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258. (In the last three cases there was a condition excluding compensation.)

(*q*) Above, pp. 611, 612; *Dyer v. Hargrave*, 10 Ves. 505.

enabling the vendor to enforce specific performance with compensation is only applicable where there is a *deficiency* in the property offered in fulfilment of the contract as compared with that described therein; and does not permit a vendor to enforce specific performance with compensation in his own favour. Thus, if a man sell for a particular price "my house and lands called Broadlands, containing 100 acres," and Broadlands contain a little less than that quantity, he may enforce specific performance with compensation: but if Broadlands contain rather more than 100 acres, it is thought that the vendor cannot oblige the purchaser to perform the contract specifically on payment of a proportionately increased price (*r*). But where a vendor makes inadvertently and in good faith a serious error to his own disadvantage in the description of the property sold or the price to be paid for it, the Court will not compel him to perform the contract specifically at suit of the purchaser; but will leave the latter to his remedy at law, unless he elect to take without compensation what the vendor really intended to sell or to pay the price the vendor meant to ask. The Court will not, however, rescind the contract at the vendor's instance in such a case (*s*).

The purchaser's right to specific performance with compensation.

So far we have dealt with the vendor's case. The purchaser under an open contract containing a misdescription of the property sold is in a different position. For the rule is that the vendor, having represented himself to be the owner of or to be entitled

(*r*) See *Manser v. Back*, 6 Hare, 443, 447, 448; 2 Dart, V. & P. 645, 5th ed.; 729, 6th ed.; 670, 7th ed.

(*s*) See *Neap v. Abbott*, C. P. Coop. (1837-8), 333; *Helsham v. Langley*, 1 Y. & C. C. C. 175; *Manser v. Back*, 6 Hare, 443, 447,

448; *Leslie v. Thompson*, 9 Hare, 268; *Alcanley v. Kinnaird*, 2 Mac. & G. 1. 7; *Scott v. Littledale*, 8 E. & B. 815; *Webster v. Cecil*, 30 Beav. 62; *North v. Percival*, 1898, 2 Ch. 128; 2 Dart, V. & P. 645, 5th ed.; 729, 6th ed.; 670, 7th ed.; above, p. 45.

to sell a particular property, is estopped from showing in avoidance of the contract that he has the right to convey a part only and not the whole of what he purported to sell (*t*). The purchaser therefore is, as a rule, entitled, if it turn out that there is a mere deficiency, whether of area, estate or right, and whether substantial or not, between the property described in the contract and that offered in fulfilment thereof, to enforce the specific performance of the contract, taking such interest in the property sold as the vendor has and receiving compensation for the deficiency. For example, where a vendor described the land sold as containing a much greater quantity than its actual area (*u*), where a vendor could make no title to a considerable part of the land sold (*x*), and where a vendor who purported to sell the fee simple of certain land was entitled as tenant for life (*y*), tenant in remainder subject to a life estate (*z*), tenant *pur autre vie* (*a*), or to an undivided moiety only (*b*), he was obliged at the purchaser's suit to convey what estate he had and to allow compensation for the deficiency. The exceptions to this rule appear to be the following:—The Court will not enforce specific performance with compensation at the purchaser's suit, where such an order would be prejudicial to the rights or interests of third parties (*c*); or where the only property which the vendor can convey is an entirely different kind of thing from that described

(*t*) *Mortlock v. Buller*, 10 Ves. 292, 315; *Castle v. Wilkinson*, L. R. 5 Ch. 531, 536; *Rudd v. Lascelles*, 1900, 1 Ch. 815, 818.

(*u*) *Hill v. Buckley*, 17 Ves. 394, in which case it was also held that, where the contents of any land sold are stated in the description thereof, it must be taken that the price was fixed with reference thereto.

(*v*) *Western v. Russell*, 3 V. & B. 187, 192.

(*y*) *Chaston v. Gower*, Finch, 164.

(*z*) *Bolingbroke's case*, 1 Sch. & Lef. 19, n., cited 2 Ph. 605; *Nelthorpe v. Holgate*, 1 Coll. 203; *Baker v. Cox*, 4 Ch. D. 464.

(*a*) *Barnes v. Wood*, L. R. 8 Eq. 424.

(*b*) *Hooper v. Smart*, L. R. 18 Eq. 683; *Harrocks v. Rigby*, 9 Ch. D. 180.

(*c*) *Thomas v. Dering*, 1 Keen, 729, 6 L. J. (N. S.) Ch. 267; *Willmott v. Barber*, 15 Ch. D. 96.

in the contract and the difference is incapable of estimation at a money value, as where land sold as unincumbered freehold is subject to restrictive covenants (*d*); or where the vendor has innocently made a serious error of description to his own disadvantage and it would be a great hardship to enforce specific performance with compensation against him (*e*). And where there has been a mistake in the description of land put up for sale by auction, and the mistake has been corrected orally by the auctioneer immediately before the sale, the purchaser cannot enforce specific performance with compensation, notwithstanding that he did not hear the correction (*f*). Besides this, it appears that where the purchaser bought with notice of the vendor's defect of title, he cannot enforce specific performance with compensation for the defect: except where the contract contained an express agreement that the vendor should show a good title or otherwise remove the defect (*g*). It is thought that if the contract for sale contain no stipulation at all respecting compensation for errors of description, but include the usual clause empowering the vendor to rescind in case of the purchaser's insistence on an unwelcome requisition (*h*), the vendor is at liberty to rescind the contract under this clause rather than comply with a requisition for compensation on account of a serious error of description innocently made to his own disadvantage (*i*).

(*d*) *Rudd v. Lascelles*, 1900, 1 Ch. 815; Fry, Sp. Perf. § 1276, 3rd ed.; and cf. below, pp. 728, 729, 731.

(*e*) *Durham v. Legard*, 34 Beav. 611; *Rudd v. Lascelles*, ubi sup.; above, p. 45.

(*f*) *Manser v. Back*, 6 Hare, 443; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, where there was an express contract to make compensation. The purchaser is, however, in such case entitled to rescind the contract, if he be

unwilling to complete without compensation: see the case last cited.

(*g*) Above, p. 203; *Castle v. Wilkinson*, L. R. 5 Ch. 534; Fry, Sp. Perf. § 1271, 3rd ed. Distinguish *Barker v. Cox*, 4 Ch. D. 464, on the ground that there the vendor expressly undertook to procure an assurance from all necessary parties.

(*h*) Above, pp. 64, 182—187.

(*i*) Fry, Sp. Perf. § 1269, 3rd ed.; and see above, pp. 183, 187,

Where lands are sold under a stipulation that errors of description shall not annul the sale, but no compensation shall be allowed therefor (*k*), the contract is not broken at law by any small discrepancy between the property sold and that offered in fulfilment of the contract (*l*); and the vendor may enforce specific performance of the contract without compensation, notwithstanding any such discrepancy. But it is held that, as regards the enforcement of the contract at the vendor's suit, whether in equity specifically or at law, such a stipulation only covers small errors of description, and does not oblige the purchaser to accept a property which is substantially different from that which the vendor purported to sell (*m*). The better opinion is, however, that the purchaser is precluded by such a stipulation from requiring specific performance of the contract with compensation (*n*), whether the error of description were small or great (*o*). If the contract contain this stipulation and also the usual clause enabling the vendor to rescind (*p*), and the purchaser claim compensation for a misdescription, made innocently but involving a considerable error to the vendor's disadvantage, the vendor will be entitled to exercise the right of rescission so reserved to him (*q*).

Condition excluding any right to compensation for errors of description.

Where it is a term of the contract that errors of description shall not annul the sale, but compensation shall be made or allowed therefor (*r*), the contract is enforceable by the vendor with compensation either at law or specifically in equity, even though there be a considerable discrepancy in quantity or estate between

Condition allowing compensation: the vendor's rights.

and cases cited below, pp. 727, n. (*q*), 732, nn. (*s*), (*u*).

(*k*) Above, pp. 65, 73.

(*l*) *Nicoll v. Chambers*, 11 C. B. 996.

(*m*) *Jacobs v. Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*n*) Above, p. 725.

(*o*) See cases cited above, p. 66, n. (*b*).

(*p*) Above, pp. 64, 182—187.

(*q*) *Re Terry and White's Contract*, 32 Ch. D. 14; see below, p. 732.

(*r*) Above, p. 66.

*Re Fawcett
and Holmes.*

the property sold and that offered to be conveyed, provided that this be not something substantially different in kind from what was described in the contract (s). Thus, where property sold as "a messuage situate in T. Street, with the builder's yard, stables and premises, as lately in the occupation of F., and containing 1,372 square yards" really comprised 1,033 only, but otherwise answered the description, it was held that the vendor was entitled to enforce specific performance with compensation (t). And where the stipulation is that compensation for errors of description shall be allowed on either side, the vendor is entitled at law to claim compensation for an error innocently made to his own disadvantage (u). It is thought, however, that as regards the specific performance of the contract, the vendor could only enforce this with compensation in his own favour in the case of small errors and could not oblige the purchaser to take a property misdescribed by the vendor's own fault at a substantial increase on the price agreed upon (x). But it is considered that the purchaser could not in such case insist on specific performance by the vendor without allowing him compensation according to the agreement (y). It is established that, under a contract containing an agreement to give compensation for errors of description, the purchaser is not bound, either at law or in equity, to accept in fulfilment of the contract a substantially different sort of property from what he agreed to buy; the rule being that the agreement in question has no application if there be a misdescription which, "although not proceeding from fraud, is in a material and substantial point, so far

The rule in
Flight v.
Booth.

(s) *Price v. Macaulay*, 2 De G. M. & G. 339; *Re Fawcett and Holmes*, 42 Ch. D. 150; *Re Brewer and Hankins*, 80 L. T. 127.

(t) *Re Fawcett and Holmes*, ubi sup.

(u) *Leslie v. Thompson*, 9 Hare,

268; cf. above, p. 724.

(x) See 2 Dart, V. & P. 645—647, 5th ed.; 729, 730, 6th ed.; 669, 670, 7th ed.; *Price v. North*, 2 Y. & C. 620, 626.

(y) 2 Dart, V. & P. 646, 5th ed.; 730, 6th ed.; 670, 7th ed.

affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all" (z). Thus, where leaseholds were put up for sale as being subject to certain particular restrictive conditions, and under an agreement providing that compensation should be made for errors of description, and the restrictive covenants contained in the lease were of a more onerous nature than was so represented, it was held that the purchaser was entitled to rescind the contract and recover his deposit (z). The same law was applied where an essential part of property described as held for a term of twenty-three years was held from year to year only (a); where land sold as copyhold turned out to be freehold (b); where lands sold as leasehold were held by underlease (c); and where property described as a freehold ground rent was really a sum payable yearly under a covenant and not rent reserved on a demise of land (d). It appears, too, that where the deficiency is incapable of estimation at a pecuniary value, the condition in question is not applicable (e). And it is not applicable where the misdescription amounts to a wrongful misrepresentation; and this is the case although the error might well be the subject of compensation, if the misrepresentation had been innocent (f).

In the cases above mentioned (g), where it was held that the agreement to give compensation was not

Extent of the condition for compensation.

z *Flight v. Booth*, 1 Bing. N. C. 370.

a) *Dobell v. Hutchinson*, 3 A. & E. 355.

(b) *Ayles v. Cox*, 16 Beav. 23.

c) *Madeley v. Booth*, 2 De G. & Sm. 718. This case was adversely criticised by Jessel, M.R., in *Camberwell, &c. Socy. v. Holbourn*, 13 Ch. D. 754, 760; but its authority was recognised in *Re Boffins and Masters' Contract*,

C. A. 39 Ch. D. 110; above, pp. 101, n. (i), 350.

(d) *Evans v. Robins*, 8 Jur. N. S. 846; see above, p. 398.

(e) *Brooke v. Routhwaite*, 5 Hare, 298; *Ridgway v. Gray*, 1 Mac. & G. 109; Fry, Sp. Perf. § 1247, 3rd ed.; cf. above, pp. 725, 726.

(f) Above, p. 723, and n. (a); cf. above, p. 187, and n. (n).

(g) Above, nn. (i), (a), (b), (c), (d).

applicable if the property produced were an entirely different thing from that sold, it will be observed that the difference was in a matter of right, and not of physical content. In all those cases the words of the agreement were large enough to include a mere deficiency of estate or right. The common form of this condition provides for allowing compensation if any error, mis-statement or omission, be discovered in the particulars of sale (*h*); and it appears that these words are applicable (with the limitations above mentioned) to an error or mis-statement made in the particulars with regard to a matter of right as well as of physical content (*i*). But where the condition was that compensation should be made for errors of description in the *property*, it was held that this was only applicable to mistakes in describing the land sold and did not extend to defects of title, as where land sold as leasehold is held by underlease (*j*). And where the condition was in common form, and some property not belonging to the vendor was inadvertently included in the particulars, but the property as sold was conveyed to the purchaser on completion, and the mistake was not discovered until afterwards, it was held that the condition was not applicable to a defect of title so as to enable the purchaser to recover compensation under it *after completion* (*k*). But the real ground of this decision was that, where the whole of that which was sold has been actually conveyed, the entire contract is discharged, and, in the absence of fraud, no compensation is after-

*Debenham v.
Sawbridge.*

(*h*) 1 Davidson, Prec. Conv. 611, n., 4th ed.; 1 Key & Elph. Prec. Conv. 255, 8th ed.

(*i*) Thus, in *Re Fawcett and Holmes* (above, p. 728), it was held that the clause of compensation was applicable although the fact was that the vendor had no title to the land, which formed the difference between that sold and that offered in fulfilment of the contract. The

vendor had formerly owned that land, but had parted with it before the contract, and had inadvertently sold by the old description; and see *Cann v. Cann*, 3 Sim. 447.

(*j*) *Re Boyfus and Masters' Contract*, 39 Ch. D. 110; above, p. 729.

(*k*) *Debenham v. Sawbridge*, 1901, 2 Ch. 98.

wards recoverable for a defect of title, except under covenants for title (*l*). And there appears to be no doubt that if in that case the mistake had been discovered before completion, compensation would have been payable under the condition (*m*).

With respect to the purchaser's right to enforce the contract with compensation, where there is an express agreement to make compensation for errors of description, regard must of course be had to the exact terms of the agreement in each particular case: but the right so given does not in general exclude, or add or subtract anything to or from, the right to specific performance with compensation which the purchaser would have without it (*n*). His right in this respect under the express contract appears therefore to be generally subject to the like exceptions as the right given to him by the rules of equity under an open contract (*o*). But it has been held that where there is an express agreement to make compensation, the vendor is bound to allow it, notwithstanding that the purchaser had notice of the misdescription for which it is claimed (*p*). And it seems that where compensation is provided for by the parties' express contract, the Court will be less inclined to allow the vendor to resist specific performance with compensation on the ground of hardship than where the contract is open as regards compensation for misdescription (*q*). And as we have seen (*r*), under the express agreement,

Purchaser's rights under condition providing for compensation.

(*l*) Above, pp. 611, 652, 653.

(*m*) The error was exactly parallel to that committed in *Re Fawcett and Holmes* (above, pp. 728, 730, n. (i)). In one sense it was a mistake in describing the physical contents of the property sold: but the deficiency was in both cases due to the fact that the vendor had no title to part of the land described.

(*n*) Fry, Sp. Perf. § 1287.

3rd ed.: 2 Dart, V. & P. 741, 6th ed.; 681, 7th ed.; see above, p. 724.

(*o*) Above, p. 725.

(*p*) *Leit v. Randall*, 49 L. T. 71; cf. above, pp. 203, 353, 354.

(*q*) See *Painter v. Newby*, 11 Hare, 26; Fry, Sp. Perf. §§ 1290, 1291, 3rd ed.

(*r*) Above, pp. 65, 610: but see p. 730.

the purchaser may claim compensation for an error innocently made and not found out until after completion; which he could not otherwise obtain. Where the contract contained an express agreement to make compensation for any mistake in the description of the property or the vendor's interest therein, and also a proviso enabling the vendor to rescind if the purchaser persisted in any objection or requisition, and the vendor did not show a good title to some minerals included in the sale, it was held that he was entitled to rescind under the proviso on the purchaser's persisting in the objection to the title (*s*). As we have seen (*t*), it is now considered that where the contract empowers the vendor to rescind, if any requisition be insisted on which he is unwilling to comply with, he may well exercise this power without giving any reason for so doing, provided only that he act in good faith and not arbitrarily or capriciously; and such a right of rescission appears to be exercisable, if the vendor have innocently made a serious error to his own disadvantage, notwithstanding that he have expressly agreed to make compensation for errors of description and that the error be one which would properly be the subject of compensation (*u*). But where the vendor has knowingly or recklessly (though without intention to defraud) made some material misrepresentation with respect to the property sold, so that he is unable to convey a property answering to that which he contracted to sell, he is not entitled to exercise such a power of rescission so as to deprive the purchaser of *his* rights either to rescind the contract for misrepresentation or to enforce its specific performance with compensation (*x*).

(*s*). *Mawson v. Fletcher*, L. R. 10 Eq. 212, 6 Ch. 91.

(*t*) Above, pp. 64, 182—187.

(*u*) See *R. Terry and White's*

Contract, 32 Ch. D. 14; *Ashburner v. Sewell*, 1891, 3 Ch. 405, 410.

(*x*) Above, p. 187, and n. (*u*).

If land sold be subject to some incumbrance or liability, which the vendor cannot remove, neither the vendor nor the purchaser can enforce the specific performance of the contract on the terms that the vendor shall give an indemnity against the defect (*y*); unless, of course, the contract contain an express stipulation that such an indemnity shall be given and accepted.

Neither party can enforce specific performance with an indemnity.

In connexion with the adjustment of accounts, the costs of the sale may be mentioned. As a rule, each party pays his own solicitor's costs (*z*); but, as we have seen (*a*), while the vendor must bear the expense of making the abstract, and producing all evidence of title in his own possession, the purchaser is bound, in the absence of stipulation to the contrary, to pay the expense of searching for, procuring and producing all evidence of title which is not in the vendor's possession. The purchaser, as a rule, bears the cost of preparing, making and perfecting the conveyance to himself; but the vendor must pay the expense of his own execution of the conveyance, including the charges of his solicitors

Costs of the sale.

(*y*) *Balmano v. Lumley*, 1 V. & B. 224, 225; *Fiddes v. Hooker*, 3 Madd. 193; *Aylett v. Ashton*, 1 My. & Cr. 105, 114; *Nouaille v. Flight*, 7 Beav. 521; *Ridgway v. Gray*, 1 Mac. & G. 109; *Re Weston and Thomas' Contract*, 1907, 1 Ch. 244.

(*z*) Under the Solicitors' Remuneration Act, 1881 (stat. 44 & 45 Vict. c. 44, ss. 2, 8), and s. 6 of the General Order made thereunder, the remuneration of either party's solicitor will be according to the scale prescribed by that Order, unless the solicitor has, before undertaking any business, elected by writing under his hand communicated to his client that his remuneration shall be according to the previous system as altered by Schedule II. of that Order; or unless the solicitor and his client have before or after or

in the course of the transaction of the business agreed in writing signed by the party to be charged for the remuneration of the solicitor in some other way; see *Re Frape*, 1893, 2 Ch. 284; *Re Earnshaw Wall*, 1894, 3 Ch. 156; *Re Negus*, 1895, 1 Ch. 73; *Re Baylis*, 1896, 2 Ch. 107; also *Clare v. Joseph*, 1907, 2 K. B. 369; and for the Act and Order and cases thereon, see the Annual Practice. In order to be effective, such election must be duly made by the solicitor before he does for the client in the particular matter any work, for which he would be entitled to be paid; *Hester v. Hester*, 34 Ch. D. 607; *Re Stewart*, 41 Ch. D. 494; *Re Evans*, 1905, 1 Ch. 290.

(*a*) Above, pp. 32—34, 41, 45, 84, 105, 116, 123, 124.

and counsel for perusing and settling the conveyance on his behalf. This rule must, however, be read in connexion with the obligation, which is in strict law incumbent on the vendor, of getting in at his own cost prior to completion any part of the estate contracted to be sold, which is not vested in himself or in his own power (*b*). If it be necessary, in order to vest the whole estate contracted for in the purchaser, either that other persons than the vendor shall concur in the sale or that some act shall be done by the vendor, besides the mere conveyance of such estate as is his own or in his own power, and the outstanding estate be not got in or the act be not done before completion, then the vendor must, in the absence of stipulation to the contrary, pay the expense of the concurrence of such other necessary parties in the conveyance, or of the performance of the necessary act (*c*). And, as we have seen (*d*), he may in such circumstances be called upon to bear any additional expense of the preparation of the conveyance which is incurred by reason of part of the estate being outstanding in other persons than himself. For example, the vendor being *sui juris* and fully entitled, the purchaser must pay the expense of registration of the conveyance on a sale of land situate in a register county; for in such case the vendor's conveyance passes the whole legal estate to the purchaser, who registers for his own protection against third parties (*e*). So it is thought that the purchaser must pay the expense of registration of the title, where the land sold is situate in a compulsory district; for in such case the vendor's inability to convey the legal estate by deed upon a sale is owing not to any defect in his title, but to a requirement imposed by the

(*b*) See above, pp. 619, 620.

(*c*, Above, pp. 35, 46, 619, 620.

(*d*) Above, p. 620.

(*e*) Above, pp. 373 *sq.*; *Mittelholzer v. Fullarton*, 6 Q. B. 989, 1019.

legislature; and the rule is that the purchaser pays the cost of conveyance to himself, save only the expense of its execution by the vendor (*f*). But where the vendor is a tenant in tail selling the fee simple (*g*), and the estate tail is not barred before completion, he must bear the cost of the enrolment of the conveyance; for he has no power to convey the fee simple without barring the entail (*h*). And where a married woman is the vendor, or is a necessary party to the conveyance, and she can only convey by deed acknowledged, the expense of acknowledgment falls on the vendor; for her inability to convey otherwise than in this manner is a defect of the vendor's title (*i*). So, on the sale of copyholds, where the vendor is fully competent to convey the legal estate, the purchaser must bear the expense of the surrender and admittance (except in respect of the vendor's execution of the surrender), including the fine on admittance: but where the vendor or any other person must be admitted before a proper surrender to the purchaser's use can be made, the costs of and fines consequent upon such admittance must be paid by the vendor (*k*). And as we have seen (*l*), in the absence of stipulation to the contrary, the vendor must bear the expense of the concurrence in the conveyance of any mortgagees or incumbrancers or other persons, in whom is vested any part of the estate contracted to be sold. It has also been stated above (*m*) how the expenses of the execution of statutory acknowledgments and undertakings are to be borne.

If the vendor's interest in the contract or estate in the land sold have been transferred to any other

(*f*) Above, pp. 381—385.

(*g*) See above, p. 532.

(*h*) Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.

(*i*) Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.

(*k*) Dart, V. & P. 710, 5th ed.; 801, 6th ed.; 717, 7th ed.; above, pp. 349, 350.

(*l*) Above, pp. 35, 46, 66, 73, and n. (*u*), 619—621.

(*m*) Pp. 35, 48, 694.

person pending completion, as by his death, bankruptcy or otherwise (*n*), those who succeed to his rights are of course bound, if they complete the sale, to convey the whole estate contracted for and must at their own expense procure the conveyance to be executed by all necessary parties. And if by reason of any such transfer an application to the Court (as for a vesting order (*o*)) should be necessary in order to effect the required conveyance, those who stand in the vendor's place must bear all their own costs of the application (*p*). But if the purchaser should also be a necessary party to the application, as where the sale cannot be completed without an action for specific performance (*q*), it is held that where the application has been occasioned, not by the vendor's default, but by some cause beyond his control, as by his death or lunacy, the purchaser will not be allowed his costs of the application as against the vendor's representatives, and no costs will be given on either side (*r*). If, however, the application were made necessary by some default on the vendor's part, as where under the old law (*s*) he had by a will made *after* the contract devised to an infant the land sold and had died pending completion, the vendor's representatives will be ordered to pay the purchaser's costs of the application (*t*).

§ 5.—*Of the Execution of the Conveyance.*

Completion.

We have now arrived at the subject of the actual completion of a sale of land. This usually takes place

(*n*) Above, pp. 527 *sq.*, 546, 560 *sq.*

(*o*) Above, pp. 536, 561.

(*p*) *Williams v. Glenton*, L. R. 1 Ch. 200, 207, 211.

(*q*) See above, p. 537.

(*r*) *Hanson v. Lake*, 2 Y. & C. C. C. 328; *Hinder v. Streeten*, 10 Hare, 18; *Bannerman v. Clarke*,

3 Drew. 632; *Cresswell v. Haines*, 8 Jur. N. S. 208; *Burker v. Venables*, 11 Jur. N. S. 480.

(*s*) See above, p. 528.

(*t*) *Wortham v. Dacre*, 2 K. & J. 437; *Purser v. Darby*, 4 K. & J. 41; *Sanderson v. Chadwick*, 2 N. R. 414; *Williams v. Glenton*, L. R. 1 Ch. 200, 207, 211.

at the office of the vendor's solicitors (*u*) ; and the conveyance is either executed there and then, or else, having been previously executed by the vendor and all other necessary parties, if any, it is then handed over to the purchaser in exchange for payment by him of the amount due for the price and otherwise on the adjustment of accounts between the parties (*x*). And at the same time all the title deeds and other documents of title, which were in the vendor's possession and which he has no claim to retain (*y*), are delivered over to the purchaser. The purchaser must take care that he receives a conveyance duly executed by all the conveying parties and that he pays the purchase money to such person or persons only as are entitled to receive the same and can give a good discharge therefor. He must also ascertain, as we have seen (*z*), that there is no obstacle to his entering, immediately after completion, into actual possession or enjoyment of the property sold ; and of course this should be done before payment of the purchase money. The vendor must see that he gets proper payment of the price.

As regards the execution of the conveyance, it is enacted by the Conveyancing Act of 1881 (*a*) that on a sale the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or in that of his solicitor, as such, but shall be entitled to have, at his own cost, the execution of the conveyance

Attestation of the conveyance by a witness of the purchaser's choosing.

(*u*) Above, p. 73.

(*x*) Above, pp. 713 *sq.*

(*y*) Above, pp. 680 *sq.*

(*z*) Above, pp. 609, 610.

(*a*) Stat. 44 & 45 Vict. c. 41, s. 8, applying only to sales made after the year 1881. Before this enactment, the law was that, *propter facie*, a purchaser had no right to require the vendor to execute the conveyance in the

presence of himself or his solicitor : but in special circumstances he might require the vendor to do so, and the vendor was obliged to comply with such a requisition, if it were reasonable to make it. Whether this were so was a question of fact. See *Lucy v. Chapman*, 2 De G. & J. 468, 478 ; *Essex v. Daniell*, L. R. 10 C. P. 538.

Vendor must convey in person.

Power of attorney when revoked.

attested by some person appointed by him, who may, if he thinks fit, be his solicitor. It is thought that this enactment extends to the execution of the conveyance, not only by the vendor, but also by all other necessary parties. And where the conveying parties and their solicitors are unknown to the purchaser or his solicitors, it is a prudent precaution to insist on the exercise of the right so conferred, in order to avoid all risk of forgery or fraud (*b*). The vendor is bound, as a rule, to convey the land sold in person, and the purchaser cannot be required to accept the execution of the conveyance, on behalf of any necessary party, by attorney, except where circumstances make this course absolutely necessary (*c*). The objection to the execution of any document by attorney is of course that a power of attorney is in general revoked by the death (*d*), bankruptcy (*e*), or (it is said) insanity (*f*) of the donor of the power. Even if given for valuable consideration, such a power is revoked at common law by the donor's death (*g*), though not by his bankruptcy (*h*) or insanity (*i*), or if the donor were a woman, by her marriage (*k*): but it appears that equitable relief would be afforded against the revocation of such a power by death (*l*). And if the power were given for valuable consideration and expressly made exercisable after the donor's death in the names of his

(*b*) See *King v. Smith*, 1900, 2 Ch. 425, where a landowner's solicitor fraudulently procured him to execute a mortgage of his land; *Jared v. Clements*, 1903, 1 Ch. 428, a case of the forgery by a solicitor of a receipt for the money due on an equitable mortgage.

(*c*) *Mitchel v. Neale*, 2 Ves. sen. 679; *Noel v. Weston*, 6 Madd. 50; Sug. V. & P. 563; Dart, V. & P. 569, 570, 5th ed.; 641, 642, 6th ed.; 592, 593, 7th ed.

(*d*) *Wallace v. Cook*, 5 Esp. 117; *Watson v. King*, 4 Camp. 272.

(*e*) *Horill v. Lethwaite*, 5 Esp. 158; *Dawson v. Sexton*, 1 L. J. Ch. 185.

(*f*) Story on Agency, § 481.

(*g*) *Watson v. King*, 4 Camp. 272.

(*h*) *Winch v. Keeley*, 1 T.R. 619; *Alley v. Hotsen*, 4 Camp. 325.

(*i*) Story on Agency, § 483.

(*k*) *Parnham v. Hurst*, 8 M. & W. 743.

(*l*) See *Bromley v. Holland*, 7 Ves. 3, 28; *Brasier v. Hudson*, 9 Sim. 1, 10; *Spooner v. Sandilands*, 1 Y. & C. C. C. 390.

legal representatives, it appears that it would remain valid, both at law and in equity, after his death (*m*). By the Conveyancing Act, 1882 (*n*), a power of attorney given after that year for valuable consideration and expressed in the instrument creating the power to be irrevocable, is not revoked, invalidated or affected, in favour of a purchaser (*o*), by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, or by notice of any of these things. And by the same Act (*p*), a power of attorney given after that year and expressed in the instrument creating the power to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, is not revoked, invalidated or affected, in favour of a purchaser (*q*), by the same events or notice of them. When a purchaser accepts the execution of the conveyance by attorney on behalf of any necessary party, he should not allow the purchase money to be paid over into the entire control of the vendor's agent until he has received satisfactory proof of the validity of the power at the time at which it was acted on (*r*). And the best course appears to be to stipulate for the investment of the purchase money in the meantime in the names of trustees, but at the vendor's risk (*s*). This course is unnecessary where the power of attorney is at the time of execution of the conveyance irrevocable and extends to authorize the purchase money to be paid to the donee of the power, and the purchaser is satisfied of the due execution by the vendor of the power of attorney. But

Execution of
the convey-
ance by
attorney.

(*m*) *Pearson v. Amicable Assurance Office*, 27 Beav. 229, 233, 234; 8 Jarm. Conv. Pt. I. 39, 3rd ed.; 1 Davidson, Prec. Conv. 475, 476, n., 4th ed.

(*n*) Stat. 45 & 46 Vict. c. 39, s. 8.

(*o*) See above, p. 247, n. (*c*).

as to the meaning of *purchaser* in this Act

(*p*) Sect. 9.

(*q*) See note (*o*), above.

(*r*) Sug. V. & P. 563.

(*s*) Dart, V. & P. 661, 5th ed.; 748, 6th ed.; 686, 7th ed.

it is thought that the vendor cannot oblige the purchaser to accept the execution of the conveyance by attorney on the ground that the power of attorney may be made irrevocable under the Conveyancing Act, 1882, where there is no other reason for the execution of the conveyance by attorney. Where the conveyance is to be executed by attorney, the power of attorney should be abstracted at the vendor's expense to enable the purchaser's counsel to advise upon its sufficiency; and it should be handed over to the purchaser on completion.

Execution of
some title
deed by
attorney.

It has already been mentioned that, if upon the investigation of title any of the deeds or documents of title appear to have been executed by attorney, the power of attorney ought to be abstracted and produced, and evidence must be furnished, if necessary, of the validity of the power at the time when it was exercised (*t*).

To whom the
purchase
money should
be paid.

With respect to the payment of the purchase money to the proper persons, where the purchaser has notice of any incumbrance on the property sold, he must not pay the purchase money to the vendor, but must take care that the amount due to the incumbrancers in respect of their charges is paid to them direct (*u*); and not until all such claims have been satisfied should the surplus, if any, be paid to the vendor. As a rule, where money is payable to any one, payment must be made to him in person; payment to his solicitor, banker or other agent is no discharge, unless he expressly or impliedly authorised such payment (*v*). But on the completion of sales of land, the conveying party's

(*t*) Above, pp. 119, 120.

(*u*) See above, pp. 237 *sq.*, 558, 566, 567, 625.

(*v*) *Wilkinson v. Cundlish*, 5 Ex. 91; *Veney v. Chaplin*, 2 De G. & J. 468, 477, 481; *Bourdillon v.*

Roche, 27 L. J. N. S. Ch. 681; *Catterall v. Hindle*, L. R. 2 C. P. 368; *Withington v. Tate*, L. R. 4 Ch. 288; *Expte. Swinbanks*, 11 Ch. D. 525.

solicitor is usually authorised to receive the money payable to him by the effect of the 56th section of the Conveyancing Act of 1881 (*y*). This provides that, where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration (*z*), the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any other authority in that behalf. It is considered that, under this enactment, the production by a solicitor of such a deed as above mentioned has the same effect as, and no greater virtue than, an express authority to the solicitor to receive the money; and it was therefore held that, on a sale by trustees, the purchaser might decline to act on the authority so conferred, because it would in general be a breach of trust for trustees to allow their solicitor to receive purchase money payable to them (*a*). But it was afterwards enacted by the Trustee Act, 1888 (*b*), now replaced in this respect by the Trustee Act, 1893 (*c*), with respect to the receipt of money or valuable consideration or property after the 24th of December, 1888, that a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust, by reason only of his having made or concurred

Solicitor's authority to receive the purchase money on production of the conveyance.

On a sale by trustees.

(*y*) Stat. 44 & 45 Vict. c. 41.

(*z*) Above, p. 695, and n. § *f*.

(*a*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.

(*b*) Stat. 51 & 52 Vict. c. 59,

s. 2.

(*c*) Stat. 56 & 57 Vict. c. 53,

s. 17.

in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee. Since the law has been so altered, the purchaser on a sale of land by trustees may safely pay the purchase money to the trustees' solicitor on his producing the deed of conveyance containing a receipt and executed by them (*d*).

Where the conveyance is executed by attorney.

Where a conveyance on sale is executed by attorney (*e*) the 56th section of the Conveyancing Act, 1881, does not authorise the payment of the purchase money to the solicitor of the *attorney*; it only operates as an authority from the principal for payment to his own solicitor (*d*). And where the conveyance is to be executed by attorney, and the attorney is expressly authorised to receive the purchase money, it must be paid to him in person (*e*). Here it may be noted that, if it be arranged that the conveyance shall be executed by attorney, as where the vendor is obliged to go abroad in the service of the Crown or on business before completion (*f*), the power of attorney should be expressed to be irrevocable for a fixed time under the Conveyancing Act, 1882 (*g*), and should, if the vendor be not a trustee, either authorise the attorney to receive the purchase money (in which case it must be paid to him in person) or appoint some solicitor therein named to be the principal's solicitor to receive the money on production of the executed deed of conveyance. If the principal be a trustee, he may well appoint an attorney

(*d*) *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 276, 280.

(*e*) Above, pp. 738, 739.

(*f*) See above, pp. 738—740. If the vendor, being in the service of the Crown, were ordered to go

abroad before completion, that would seem to be a case where the purchaser would be bound to accept execution of the conveyance by attorney.

(*g*) Above, p. 740.

to execute the conveyance for him (*h*): but in such case the power of attorney should follow the words above set out of the Trustee Act, 1893 (*i*), and appoint some solicitor to receive the purchase money on his behalf by producing the deed of conveyance under section 56 of the Conveyancing Act, 1881. This course, being authorised by statute, is free from objection; whilst a trustee may not otherwise expressly authorise his solicitor to receive purchase money for him except in a case of necessity (*k*).

It appears that the solicitor referred to in the 56th section of the Conveyancing Act, 1881 (*l*), is in general the solicitor acting on behalf of the person entitled to give a receipt for the money or other consideration (*m*). Thus, where the purchase money is partly payable to incumbrancers, the purchaser should not, it is thought, pay over the whole of the purchase money to the vendor's solicitor producing the deed of conveyance duly executed (*n*), without good independent evidence that he was authorised to act in this respect on the incumbrancers' behalf. But, of course, payment of the amount due to the incumbrancers may be paid to their solicitor on his producing the conveyance executed by them. Where a solicitor, who produces such a deed as is mentioned in that section (*o*), is ostensibly acting for the person entitled to give a receipt for the consideration money, it appears that the purchaser, in the absence of any ground for suspicion, is not entitled to require any independent proof that the solicitor is indeed authorised to act and is rightly acting as solicitor

Payment should be made to the solicitor acting for the person entitled to give a receipt.

Payment to solicitor ostensibly acting for a conveying party.

(*h*) *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280.

(*i*) Above, p. 741.

(*k*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387, 394, 400, 403, 404.

(*l*) Above, p. 741.

(*m*) *Day v. Woolwich, &c. Socy.*, 10 Ch. D. 491; *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280.

(*n*) Above, p. 741.

(*o*) Above, p. 741.

for that person (*p*). And if that person in any way held out the solicitor as his agent, he would be estopped from proving that he did not in fact authorise the solicitor to receive the money on production of the deed.

King v. Smith. Thus, where a solicitor fraudulently induced a client to execute a mortgage of his land and obtained the mortgage money by producing the mortgage deed so executed and made away with the money, but it was proved that the client placed such confidence in the solicitor that he would execute any deed on the solicitor's recommendation without insisting that the transaction should be explained to him, it was held that he was estopped from showing that the solicitor was not in truth empowered to act as his solicitor in the matter of receiving the money (*q*). But it does not appear that a purchaser would be protected in paying money to a solicitor ostensibly acting under the authority conferred by section 56 of the Conveyancing Act, 1881, if the solicitor had no real authority so to act, and the person to whom the money was payable had not by his conduct or otherwise held out the solicitor to be his agent (*r*). In all cases where money is paid to a solicitor in reliance on this enactment, the deed must be actually produced at the time of payment to justify the purchaser in making payment to the solicitor (*s*). Where a creditor or other person entitled to receive money authorises payment to be made to his solicitor, it appears that payment to the solicitor's managing clerk is, as a rule, a good payment (*t*); and this rule seems applicable

The deed must be produced at the time of payment.

Payment to the solicitor's clerk.

(*p*) See *Re Helling and Merton's Contract*, 1893, 3 Ch. 269, 280; *King v. Smith*, 1900, 2 Ch. 425, 432.

(*q*) *King v. Smith*, 1900, 2 Ch. 425.

(*r*) See *Re Helling and Merton's Contract*, 1893, 3 Ch. 269, 280; above, p. 743.

(*s*) *Day v. Woolwich, &c. Socy.*,

40 Ch. D. 491.

(*t*) See *Moffat v. Parsons*, 5 Taunt. 307; *Wilnot v. Smith*, 3 Car. & P. 453; *Bingham v. Allport*, 1 N. & M. 398; *Kirton v. Braithwaite*, 1 M. & W. 310; *Watson v. Hetherington*, 1 Car. & K. 36; *Hemming v. Hale*, 29 L. J. (N. S.) C. P. 137; *Finch v. Boning*, 4 C. P. D. 143.

where the authority to pay to the solicitor is given by virtue of the enactment above cited (*u*).

With respect to the vendor's securing for himself proper payment, he is of course only bound to accept banknotes or coins, which are legal tender (*x*); he may object to take a cheque or any other negotiable security (*y*). At the present time sales of land are frequently completed by means of bankers' drafts (*z*), to avoid the risk and inconvenience of carrying about banknotes of large amount; but the vendor is not obliged to accept this mode of payment, and it should be ascertained before the time fixed for actual completion that he will make no objection to it. Where a solicitor is authorised to receive the purchase money or any part of it on behalf of the vendor or any other conveying party (*a*), he is not at liberty to accept payment otherwise than in cash or notes being legal tender (*b*). This is another reason for ascertaining beforehand that no objection will be made to a banker's draft, if it be desired to tender such a draft in payment.

What is a proper payment.

The execution of the conveyance gives to the purchaser, in the case of freeholds the legal seisin, and in the case of leaseholds the like possession of the land sold (*c*); and he is thenceforth free to enter into actual

Effect of the execution of the conveyance.

(*u*) Above, p. 741.

(*x*) Current gold coin is legal tender for any amount: Bank of England notes for all sums above 5*l.*, except by the Bank itself, but not in Ireland; current silver coin for not more than 10*s.*: bronze for not more than 1*s.*: stats. 3 & 4 Will. IV. c. 98, s. 6; 8 & 9 Vict. c. 37, s. 6; 34 Vict. c. 10, ss. 1, 20.

(*y*) *Blumberg v. Life Interests, &c. Corp.*, 1897, 1 Ch. 171; *Judston v. Beages*, 1899, 2 Ch. 73.

(*z*) *I.e.*, drafts drawn by bankers

on themselves or branches of their office.

(*a*) Above, p. 741.

(*b*) *Papé v. Westacott*, 1894, 1 Q. B. 272.

(*c*) See *Capestake v. Haper*, 1908, 2 Ch. 10; articles by the author in 51 Sol. J. 478, 496, and 52 Sol. J. 510, 527; Wms. Real Prop. 206, 551, 21st ed.; Williams on Seisin, 5, 51. On the question whether the purchaser obtains a seisin in law or an actual seisin where he is in under the Statute of Uses and

possession or receipt of the rents and profits of the property purchased (*d*). On the sale of copyholds, admittance is necessary to vest in the purchaser the *legal* title to possession : but on admittance being obtained, the purchaser's legal title will relate back to the surrender (*e*).

not at common law, see Williams
on Settlements. 11—16 ; Wms.
Real Prop. 175 and n. (*l*), 178,
n. (*z*), 21st ed.

(*d*) Above, pp. 515, 516, 578.

(*e*) *Doe d. Bennington v. Hall*,
16 East, 208 ; 1 Wat. Cop. 125,
128, 4th ed.

CHAPTER XIII.

OF MISTAKE.

- § 1. Of Mistake as precluding true Consent.
 - § 2. Of Mistake in the expression of Consent,
and its Rectification.
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IN the previous part of this book the normal course of a contract for the sale of land has been traced from its formation down to its completion. We will now treat of the avoidance of the contract. This may take place either because the consent of a party thereto is in some way impeachable, as on the ground of mistake, fraud, misrepresentation, duress or undue influence; or because the contract is tainted with illegality; or because the parties or one of them are or is not of full capacity to buy or sell land (*a*). We will consider these grounds of avoiding the contract in the order in which they are named. And first, of Mistake.

§ 1.—*Of Mistake as precluding true Consent.*

We have seen (*b*) that, in order to make a valid contract, it is necessary that there should be true, full and free consent of the parties; that is, consent unimpeachable as having been induced by mistake, misrepresentation, fraud, duress or undue influence. In dealing with mistake, as the cause of the want of

(*a*) Above, pp. 1, 2.

(*b*) Above, p. 2.

consent, let us first eliminate the case where the parties are really agreed but there is an error in the expression of their consent. In that case the error may generally be rectified. And we will discuss the subject of mistake as a ground for the rectification of the agreement, after we have considered it as giving rise to a claim for obtaining the avoidance or resisting the specific performance of the contract.

Where the contract is impeachable for mistake, misrepresentation, fraud, &c., there is always an *apparent* consent.

No real assent in the case of mistake.

In the case of misrepresentation, fraud, &c., there is real consent induced by belief in non-existent facts or by coercive influence.

Avorable mistake makes the contract void from the beginning.

Now in all cases where the validity of a contract is impeachable on the ground of mistake, misrepresentation, fraud, duress or undue influence, there is an apparent consent of the parties. At first sight, their minds are met. But the case of mistake appears to differ from the other grounds above mentioned for setting aside the contract in this, that where there is mistake there never has been an intention common to both parties—the one has never given any real assent to what has been proposed by the other. Apparently, the one did an act which amounted in the law to contract: but his mind did not accompany his overt act; he never intended to do what, to all outward appearance, he did. But in the case of misrepresentation, fraud, duress or undue influence, a consent, which is to a certain extent a true consent, accompanies the act, which is outwardly manifested. The party misled by misrepresentation or fraud, or coerced or influenced, really means to agree with the other in the terms expressed; he truly intends to contract: only he would not have been willing to do so, if he had known the truth with regard to the fact, as to which he was misled by the other, either innocently or fraudulently, or if he had not been forced or influenced. The consequence of this distinction is very marked. Contracts induced by any mistake, which the mistaken party is not estopped from asserting, are altogether void from the beginning; there never has been from the outset any agreement

between the parties. But contracts induced by misrepresentation, fraud, &c., are voidable only. This contrast is perhaps best illustrated in the case of negotiable instruments. A bill of exchange or promissory note, which was given or made by some averrable mistake, excluding true consent, is void, and is therefore of no more avail in the hands of a holder in due course than a forged bill or note (*c*). But a bill or note procured to be made by fraud, though voidable by the giver or maker as against the party who misled him, is valid in the hands of a holder in due course, against whom the plea of fraud cannot prevail (*d*).

Contracts induced by misrepresentation, fraud, &c., are voidable only.

With regard to mistake as a ground for avoiding a contract altogether, the rule of the common law appears to be that, in order to make a valid contract, there must be true consent of the parties; so that, where owing to a mistake the parties' minds are not at one, the contract is void; that is to say, there is no agreement at all (*e*).

The rule is that, where owing to mistake the parties' minds are not at one, there is no contract.

(*c*) *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Lewis v. Clay*, 67 L. J. Q. B. 224. As to forged instruments, see next Chapter, § 1, at end.

(*d*) Stat. 45 & 46 Vict. c. 61, ss. 29, 30, 38; *Tatum v. Haslar*, 23 Q. B. D. 345; *Chilton v. Attenborough*, 1895, 2 Q. B. 306, 707; 1897, A. C. 90.

(*e*) *Smith v. Hughes*, L. R. 6 Q. B. 597, 607, 609; Benjamin on Sale, 42, 2nd ed. The same rule appears to hold good as regards the conveyance of any property; if there be no true assent of the parties in parting with and accepting the thing assured, the conveyance is void. But as regards the conveyance of lands or goods, this rule is subject to the qualification that the assent of the alienee is presumed until the contrary be shown, and in the meantime (if the conveyance were duly made in accordance with the forms prescribed by

law) the alienor is estopped from disputing the assurance. Thus if one disclaim a conveyance of lands or goods made to him, the conveyance is thenceforth void as from the time of its execution; but until disclaimer the estate or property passes to the alienee. See Bract. fo. 15 b, 16; Y. B. 7 Edw. IV. 20 (pl. 21), 29 (pl. 14); Litt. ss. 684, 685; *Thoroughgood's case*, 2 Rep. 9; *Hutler and Baker's case*, 3 Rep. 25a, 26b; Shep. Touch. 229, 267, 285; *Thompson v. Leach*, 2 Vent. 198, 202, 208; 2 Prest. Abst. 226—228; *Siggers v. Evans*, 5 E. & B. 367, 380 sq.; *Peacock v. Eastland*, L. R. 10 Eq. 17; *Expte. Cote*, L. R. 9 Ch. 27, 32; *Standing v. Bowring*, 31 Ch. D. 282; *Mallott v. Wilson*, 1903, 2 Ch. 494; *Edmunds v. Edmunds*, 1904, P. 362, 374; *Howatson v. Webb*, 1907, 1 Ch. 537, 543—548, affirmed, 1908, 1 Ch. 1; *Bagot v. Chapman*, 1907, 2 Ch. 222.

Unilateral
mistake.

If one
manifest
a certain
intention, he
is estopped
from proving
that his real
intention was
different.

And it seems that this rule may in some cases hold good, notwithstanding that the mistake be that of one party only, the other truly intending to contract in the terms expressed (*f*). The rule is, however, subject to the qualification, that "whatever be a man's real intention, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention" (*g*). In other words, the rule requiring true consent of the parties to a contract is modified by the operation of the general rule of law that every man is taken to intend the natural and reasonable consequences of his own overt acts, including his spoken or written words; he is estopped from showing that what he really intended was something different from what a man of ordinary intelligence would naturally and reasonably infer from those acts or words (*h*). And this qualification is of enormous importance; indeed in practice the qualification overshadows the rule. For the instances, in which a person truly mistaken is estopped from proving his real intention, are so much more common than those in which there is no such estoppel, that when we come upon a case where a man's real intention may be set up to defeat an apparent expression of his consent, we are apt to regard it as exceptional (*i*).

(*f*) See *Thoroughgood's case*, 2 Rep. 9; below, pp. 753—755.

(*g*) Benjamin on Sale, 45, 2nd ed.

(*h*) *Freeman v. Cooke*, 2 Ex. 654, 663; *Cornish v. Abington*, 4 H. &

N. 549, 555, 556; *Smith v. Hughes*, L. R. 6 Q. B. 597, 607, 609;

Smith v. Chadwick, 9 App. Cas. 187, 190; *Little v. Spreadbury*, 1910, 2 K. B. 658, 664, 665.

(*i*) The writer is aware that it is contended by eminent jurists that the law has no concern at all with the real intentions of the parties to a contract, but can only regard the intention which they have outwardly manifested; O. W. Holmes, *The Common Law*, 309; Holland, *Jurisprudence*, 246—252, 9th ed. It is nevertheless submitted that the common law of England is as stated in the text, and recognises, as a rule of pure law (so pure that it rarely emerges from the region of abstract theory into concrete shape), that the true consent of the parties is necessary to make a valid contract. This precept of perfection is almost always obscured by the operation of the qualifying

Subject to this qualification then the rule is that contracts purported to be made by spoken or written

Mistake on some point going to the whole subject of the contract.

law of estoppel by outward manifestation of consent. But it is contended that the principle, that true consent is necessary to make a contract, is exhibited in the case where the terms of a written contract contain a latent ambiguity with regard to the subject matter thereof. Thus in the well-known case of *Raffles v. Wichelhaus*, 2 H. & C. 906, where the plaintiff sued for breach of a contract for the sale of goods "to arrive ex Peerless," it was pleaded that the defendant meant a ship so called which sailed from Bombay in October, but the plaintiff had not offered any goods arriving by this ship in fulfilment of the contract, and had only offered goods arriving by another ship of the same name; and this was held upon the plaintiff's demurrer to be a good plea. This decision shows that where there is no true consent, there is no contract. But if the plea had been set up fraudulently, it would have been competent to the plaintiff to join issue thereon and to give evidence that the defendant really meant the same ship as the plaintiff; see cases cited, below, pp. 760, n. (s), 782, n. (a); *Smith v. Thompson*, 8 C. B. 44, 59, 60; *Bruff v. Conybeare*, 13 C. B. N. S. 263, 274, 275. It thus appears that ultimately the law does regard the parties' real intention. If this were not so, and the law were *never* concerned with anything but what the parties have said, every contract expressed in terms similar to that in *Raffles v. Wichelhaus* would be void for uncertainty so soon as it appeared that the description could be applied to more than one object, and no further evidence would be admissible. But that is not the law; see *Re Hubbuck*, 1905, P. 129, 132—134. If I have two estates called Blackacre, one in Hampshire and the other in Northumberland, and I contract with J. S., who knows nothing of my estate in Northumberland, but whom I have shown over my estate in Hampshire as an intending purchaser, to sell to him "my estate called Blackacre," this contract is not rendered void for uncertainty on my proving that I have another Blackacre in Northumberland, but J. S. is at liberty to give oral evidence that I took him over Blackacre in Hampshire and offered to sell that property to him, and so to prove that that property is what was really referred to or meant by both parties in the written memorandum under the description of "my estate called Blackacre." It must be admitted, however, that there is authority for the theory that, in such cases, the question is not what did the parties intend, but is, what is the signification of the words they have used; Parke, J., *Richardson v. Watson*, 4 B. & Ad. 787, 800; and see L. Q. R. xx. 245. This view is upheld by Mr. Justice O. W. Holmes, *The Common Law*, p. 309, where he maintains that the true ground of the decision in *Raffles v. Wichelhaus* was, not that each party meant, but that each said a different thing; see also *Harvard Law Review*, xii. 417. But considering that each party, in so far as he said anything at all, used the very same words, it could only be established that they said a different thing by showing that the word used signified to the mind of the plaintiff one ship and to the mind of the defendant another, or held out to the defendant's mind one meaning and to the plaintiff's another. The difference between proving what was in the parties' minds as to the signification of the word used, and proving what was their intention, seems to be very fine. And upon either view of the matter, the plaintiff was at liberty to prove, if he could, that the parties' minds were at one as regards the meaning of the word *Peerless*.

Raffles v. Wichelhaus.

words apparently expressing a true consent are void if there be no real agreement of the parties' minds in

It seems therefore that the law *does* sometimes take account of what passes in men's minds, and does in this instance require that the parties' minds shall be at one. And it is submitted that, if the outward manifestation were alone to be regarded, there could be but one conclusion in all such cases, namely, that the parties have said what is ambiguous and therefore void for uncertainty. Again, where A. is induced by the fraud of B. to sign a contract for the sale of his land to C. in the belief that he is signing an agreement for a lease, A. would surely be bound, if the outward manifestation of his intention could alone be considered. But he is at liberty to prove that his intention did not accompany his apparent act, and is not bound, unless he be estopped by his negligence; see below, pp. 753—755. It may perhaps be more readily maintained in this case that A. is not bound because he and C. have not really said the same thing, have not in truth joined in the expression of consent; see O. W. Holmes, *The Common Law*, 308, 309. But it may be replied that to all outward appearance A. and C. *have* said the same thing, for A. has himself affixed his own signature to the document: but A. did not mean to do so; and in the particular circumstances he is not precluded from giving evidence as to the state of his own mind at the time when he signed the writing. It is further submitted that, upon a general view of the law of England, taking in the rules of equity as well as of common law, we can hardly fail to recognise the principle, that there ought to be true consent to make a contract. It was on this principle that Courts of Equity would refuse to enforce specific performance of a contract wanting in the element of true consent, though valid, on the ground of manifested consent, at law. Not until the year 1880 was it decided that the law of estoppel through manifestation of consent *may* prevail over this principle in the matter of enforcing specific performance of the contract as it may in determining the validity of the agreement at law: *Tamplin v. James*, 15 Ch. D. 215. And though the rule requiring true consent is now so qualified, it is nevertheless still open to Courts of Equity to give effect to it by refusing specific performance where there is a want of true consent and it would work great hardship on the mistaken party to apply the law of estoppel. See below, pp. 774—776 and n. (x), and above, p. 724. The case of *Re Meyer*, 1908, P. 353, appears to support the author's position. In that case a lady executed by mistake a document intended to be signed by her sister as a codicil to the sister's will; and it was held that the document was void for want of any true intention to execute it. Consider also *Hood v. McKinnon*, 1909, 1 Ch. 476, where a deed exercising voluntarily and without agreement with any other person a power of appointment was set aside at the appointor's instance on proof that she had executed it in forgetfulness of a prior appointment in favour of the same appointee and so under a mistake of fact. These cases prove that, as regards any purely unilateral act affecting a man's legal position or relations and purported to be evidenced by some document, the rule is that execution of the document must be accompanied with true intention to do the act evidenced. But if this be the law, it follows that the validity of a contract made by the unilateral mistake of one party only must depend, where the mistake is not averrable, on the principle of his not being allowed to depart from the consent or intention manifested or held out to the other party, that is, on the principle of estoppel.

some point which goes to the whole substance of the contract (*k*). Thus on an apparent agreement for the sale of land, if the parties' minds be not at one, owing to an averrable mistake made on either side with regard to the nature of the transaction, the personality of the other contractor or the property to be sold, there is no contract between them. But if the party mistaken have expressed himself in words which are free from ambiguity and are apt to constitute a valid contract if taken in the meaning which they would naturally convey to a man of ordinary intelligence, then he is estopped from showing that his mental intention was not in accordance with his overt act (*l*). To give examples, first, as to mistake in the nature of the transaction. If one sign a contract for the sale of land under the impression that he is executing an instrument giving effect to some transaction of an entirely different character, for instance, a mortgage, a lease or a power of attorney, the contract may be void, because the man's intention did not accompany his act (*m*). It seems impossible to put a concrete case of this kind in which the mistake has not been caused by the fraud of the other party to the alleged agreement, or by the fraud, negligence or unauthorised interference of a third person, and yet the party mistaken is not estopped from proving his mistake; for if a man of sound understanding sign a legal document without reading it or having it read to him, he is bound by its contents (*n*); and, as we

Estoppel by manifestation of a particular intention.

Mistake in the nature of the transaction.

(*k*) *Kennedy v. Panama, &c. Mail Co.*, L. R. 2 Q. B. 580, 588; *Howatson v. Webb*, 1907, 1 Ch. 537, 543—549, affirmed, 1908, 1 Ch. 1; *Bagot v. Chapman*, 1907, 2 Ch. 222; above, p. 749.

(*l*) Above, p. 750.

(*m*) *Thoroughgood's case*, 2 Rep. 9; *Simons v. Great Western Ry. Co.*, 2 C. B. N. S. 620; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Lewis v. Clay*, 67 L. J. Q. B. 224;

Howatson v. Webb, 1907, 1 Ch. 537, 543—549, affirmed, 1908, 1 Ch. 1; *Bagot v. Chapman*, 1907, 2 Ch. 222. The law is the same as regards the execution under a mistake of a deed of conveyance or any other deed; *Thoroughgood's case*, ubi sup.; *Pepet's case*, 11 Rep. 26b. 27b; see below, pp. 756, 757.

(*n*) *Thoroughgood's case*, 2 Rep. 9 a, b; *Mauvel's case*, Moore

shall see, the party mistaken *may* be estopped by reason of his negligence where a third person wrongfully misled him. But the rule is clearly established where the mistake was made in consequence of the other party's or by a third person's fraud. Thus if a blind or an illiterate man, or even a man free from any physical defect and of ordinary understanding, be induced by the fraud of some person minded to entrap him into a contract, or by the fraud of his own solicitor or servant or some stranger (without any negligence or carelessness on his own part), to sign a contract for sale of his land under the impression that he is executing some document of an entirely different nature, the document is altogether void. It is not his act, for he never intended to utter such a document, and the case is exactly the same as if his signature had been forged (*o*). Or it may be likened to the case where a man, who has received an offer of sale or purchase of land, writes a letter of acceptance, but, being in doubt whether he will send it, places the letter in a drawer to remain there until he shall reconsider the matter (*p*), and a third party without the writer's authority takes the letter from the drawer and sends it to the person who made the offer; in which case it is submitted that no contract is concluded between the parties (*q*). In these instances

Letter of acceptance sent without the writer's authority.

(K. B.), 182, 184; *Shep. Touch.* 56; *Anon.*, *Skin* 159, pl. 6; *Albemarle v. Bath*, *Freem. Ch.* 193, 194; *S.C. nom. Bath v. Montague*, 3 Ch. Ca. 55, 56, 59, 75, 76; *R. v. Longnor*, 4 B. & Ad. 647; *Mellish, L.J., Hunter v. Walters*, L. R. 7 Ch. 75, 87; *Tamplin v. James*, 15 Ch. D. 215; *Farwell, L.J., Howatson v. Webb*, 1908, 1 Ch. 1, 3, 4; *Chaplin & Co., Ltd. v. Brammall*, 1908, 1 K. B. 233, 234, 235; *Alliance Credit Bank of London v. Owen*, *Times Newspaper*, 27th May, 1908.

(*o*) See previous note. As to

forgery, see next Chapter, § 1, at end.

(*p*) See above, p. 16.

(*q*) See *Phillips v. Edwards*, 33 Beav. 440, 445; *Henkel v. Pope*, L. R. 6 Ex. 7; *Baxendale v. Bennett*, 3 Q. B. D. 525; *Clutton v. Attenborough*, 1897, A. C. 90, 96. The offer appears to be ostensibly accepted through the agency of a third person acting without the authority of the party purported to be bound; and the writer of the letter is, it is submitted, no more bound than he would be if the third person had, without his

there is no reason why the party mistaken should be estopped from proving that his intention did not accompany his apparent act; he has not held himself out as expressing a contractual intention, nor has he been guilty of negligence (*r*). And it will be observed that in the cases where the mistake was caused, not by the other contractor's fraud but by the wrongful or improper intervention of a third person, the party mistaken is at liberty to prove that his intention did not accompany his outward act, notwithstanding that the mistake was on his side only, the other party truly intending to contract as expressed in the apparent agreement. But where a man makes a mistake of this kind solely by his own inadvertence, he will in general be precluded from alleging it. Thus we have seen that, where a man executes a deed or signs a contract without reading it, he cannot avoid it; and it is submitted that if one in absence of mind sign and send a letter accepting an offer of sale or purchase, in the belief that he is accepting an invitation to dinner, he is bound (*s*). So also it is contended that, where a man, who has written a letter accepting an offer, but intends not to send it until he has reconsidered the matter, by his own inadvertence posts the letter or gives it to another to post, he would be estopped, after the letter had been posted (*t*), from

Unilateral mistake.

Estoppel arising from a man's own carelessness.

authority, written a letter of acceptance in his name; see *Hollins v. Fowler*, L. R. 7 H. L. 757. So where a deed or a similar legal instrument is executed as an escrow, and entrusted to a solicitor to keep until performance of the required condition, and he fraudulently delivers the same without exacting performance of the condition, the person who executed the deed is not estopped from showing that it was not his act; *Lloyd's Bank, Ltd. v. Bullock*, 1896, 2 Ch. 122, 194. It may be noted that where one has signed, but not issued, a negotiable instrument complete

and valid on the face of it, and the same is taken out of his possession against his will, and put into circulation, it appears that, as against a holder in due course, he cannot avoid his liability on the ground that, owing to the want of any consent between himself and the other party to the instrument, there was no contract at all between them; see *Clutton v. Attenborough*, 1897, A. C. 90, 93, 96; and cf. *Smith v. Prosser*, 1907, 2 K. B. 735.

(*r*) See previous note.

(*s*) See above, p. 753, n. (*u*).

(*t*) Above, p. 16.

Executing,
without
inquiry, a
document
presented
by one's
solicitor.

Misunder-
standing as to
effect of a
legal docu-
ment.

Difference
between
transactions
void and
voidable.

showing that he did not intend to contract as expressed in the letter (*u*). Similarly, when a man knows that he is executing at his solicitor's instance a document which will have some legal consequence—which will be an act on his part affecting his legal position or relations—but he does not ask what will be its exact effect, and has such confidence in his solicitor that he is content to execute it in ignorance, then the document is not *void*; though it may be *voidable* for fraud, if his solicitor fraudulently misled him (*x*). And in this case the validity of the document, where it binds the party to some transaction into which he did not intend to enter, appears to depend on estoppel; the man's intention did not really accompany his act, but he is precluded by his own negligence from setting-up this objection. So also, if a man execute a document intended to carry out some legal transaction, of the general nature of which he is well aware, such as the sale of his land, he cannot be heard to say that he did not understand the legal effect of the words used, or that he did not mean to enter into the legal obligations or do the legal acts, which according to the proper legal construction of those words are thereby expressed to be undertaken or done (*y*). As we have seen (*z*), the case, where a man executes a legal instrument by mistake under the impression that he is entering into some

(*u*) See H. T. Chitty, *arguendo*, *Henkel v. Pape*, L. R. 6 Ex. 7, 8; Anson on Contract, 159, 160, 8th ed. It is submitted that the remark of Collins, M. R., in *Van Praagh v. Everidge*, 1903, 1 Ch. 434, 436, that it was not clear to him, whether the parties were *ad idem*, must not be taken in a sense adverse to the above conclusion. In that case the parties' minds were most certainly not in *truth* at one: but the question whether the defendant was not estopped at law from proving the

truth was not argued or decided in the Court of Appeal.

(*x*) See Melish, L. J., *Hunter v. Walters*, L. R. 7 Ch. 75, 88; *King v. Smith*, 1900, 2 Ch. 425, 430; *Howatson v. Webb*, 1907, 1 Ch. 537, 1908, 1 Ch. 1; above, p. 743.

(*y*) *Powell v. Smith*, L. R. 14 Eq. 85; *Tamplin v. James*, 15 Ch. D. 215; *Stewart v. Kennedy*, 15 App. Cas. 108; *Howatson v. Webb*, *ubi sup.*

(*z*) Above, p. 748.

transaction entirely different from that evidenced by the instrument, must be carefully distinguished from that where he is induced to make a contract or conveyance by a fraudulent misrepresentation as to some fact, other than the nature of the transaction contemplated. In the one case, if the man is not estopped from proving that his intention did not accompany his overt act, the instrument is void (*a*). In the other, he did really intend, at the time of executing the document, to make the contract or conveyance therein expressed: but he would not have had this intention if he had known the truth as to the fact misrepresented (*b*). The document is therefore voidable by him, but it is not altogether void from the outset (*b*). Attached to this distinction is the very important consequence, as regards the conveyance induced by such fraudulent misrepresentation of lands or goods, that if the person who has taken under such a conveyance dispose of the lands or goods to a purchaser for value (*c*) taking in good faith without notice of the fraud, the conveyance procured by fraud is not voidable as against the purchaser (*d*).

Conveyance induced by misrepresentation, fraud, &c. not voidable as against a purchaser for value without notice.

(*a*) Above, pp. 748—753.

(*b*) Above, p. 748; *Hunter v. Walters*, L. R. 7 Ch. 75, 82; *Onward Building Society v. Smithson*, 1893, 1 Ch. 1, 15; *Lloyd's Bank, Ltd. v. Bullock*, 1896, 2 Ch. 192, 196, 197.

(*c*) That is, a purchaser for valuable consideration actually paid or executed; *Hardingham v. Nicholls*, 5 Ark. 304; *Sug. V. & P.* 789; above, pp. 566, 567, and n. (*b*).

(*d*) In this respect the rules of law and equity are the same; so that the conveyance procured by fraud of an equitable estate or interest in lands or goods is not voidable as against a *bonâ fide* purchaser for value without notice of the fraud; and the conveyance so procured of a legal estate or interest cannot be avoided as against such a purchaser taking

an equitable interest only; *Sturge v. Storr*, 2 My. & K. 195; *Phillips v. Phillips*, 4 De G. F. & J. 208, 218; *Hunter v. Walters*, L. R. 7 Ch. 75; *Lindley, L. J., National Provincial Bank of England v. Jackson*, 33 Ch. D. 1, 13; *Lloyd's Bank, Ltd. v. Bullock*, 1896, 2 Ch. 192, 197; cf. *Cave v. Cave*, 15 Ch. D. 639, 647. As to the common law rule, see *White v. Garden*, 10 C. B. 919; *Kingsford v. Merry*, 25 L. J. N. S. Ex. 166, reversed on another ground, 26 L. J. N. S. Ex. 83; *Pease v. Gloaghec*, L. R. 1 P. C. 219, 229, 230; *Cundy v. Lindsay*, 3 App. Cas. 459, 464; *Vilmont v. Bentley*, 18 Q. B. D. 322, 330; 12 App. Cas. 471, 473, 483 (this decision gave rise to the amending stat. 56 & 57 Vict. c. 71, s. 24 (2)); stat. 56 & 57 Vict. c. 71, s. 23; *Wms. Pers. Prop.* 543, 16th ed.

Contracts induced by fraud remain voidable, as against the other contractor's assigns.

Where a sale of land is executed by payment of the purchase money.

This doctrine, however, relates only to *conveyances* procured by fraud. *Contracts* induced by fraud may, as a rule, be avoided, notwithstanding that the benefits thereof have been assigned to one taking in good faith and for value without notice of the fraud; for the assignee of the benefit of a contract takes subject to all equities existing between his assignor and the other contractor (*e*). To this rule, negotiable instruments are an exception (*f*). But it should be noted, especially in connexion with contracts for the sale of land, that the rule is only applicable so long as the thing assigned is the benefit of an obligation arising from contract, that is to say, a thing in action. We have seen that where a contract for the sale of land is executed by payment of the purchase money, the purchaser becomes absolutely and entirely entitled in equity to the land, the vendor being thenceforward a bare trustee for him, and having no longer any lien on the land (*g*). In this state of things the vendor is regarded in equity as having made a complete conveyance of the land, and not as remaining under contract to convey it; the parties' agreement has in equity passed out of the stage of executory into that of executed contract. It appears therefore that if a contract so executed were induced by the purchaser's fraud, and he resold or mortgaged the land to a purchaser taking for valuable consideration paid or executed (*h*), in good faith and without notice of the fraud, the vendor could not set aside the sale as against such subsequent purchaser (*i*). But it seems that, until this stage of the contract has been reached, it remains, for the purposes of the rule in question, an executory

(*e*) *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294; *Graham v. Johnson*, L. R. 8 Eq. 36, 43; *Re Palmer's, &c. Co.*, 1904, 2 Ch. 743; above, p. 661.

(*f*) Above, p. 749.

(*g*) Above, pp. 505—507, 530, 538, 546, 558, 560.

(*h*) See above, p. 757, n. (*c*).

(*i*) For this purpose it is, as we have seen, immaterial that the subsequent purchaser has not the legal estate; above, p. 757, n. (*d*).

contract, the parties' relations being those of mutual obligation only (*k*).

Where one enters into an apparent contract under a mistake as to the person with whom he is contracting, and the personality of the other party is a material element in determining his intention, there is no true consent and the contract is void (*l*); unless he be estopped from proving his real intention. Thus if A. be induced by means of personation or any other fraud to sign a contract for sale of his land to B. under the impression that he is contracting with C., there is no real consent, no true agreement between the parties (*m*); the case is the same as if A. signed the contract in the belief that it was a mortgage (*n*); and A.'s supposed act in the law is altogether void. But if B., acting in good faith and without any fraudulent intent, go to A. and offer to buy A.'s land and A. sign an agreement accordingly, A. cannot, it is submitted, escape from the obligation so contracted by proving that he supposed that B. was C., if B. did nothing to induce that belief and a man of ordinary intelligence would reasonably and naturally suppose from A.'s acts and words that he intended to contract with B. (*o*), and provided that B. were not aware that A. contracted with him under the impression that he was C. (*p*). If one party to a sale of land be under a mistake as to the person of the other contractor, but the personality of

Mistake as to the person of the other party to the contract.

Estoppel from proving error in the person.

(*k*) See *Rose v. Watson*, 10 H. L. C. 672, 678.

(*l*) *Boulton v. Jones*, 2 H. & N. 564; *Benjamin on Sale*, 46, 2nd ed.; *Smith v. Wetherup*, 9 Ch. D. 223, 230; *Nash v. Dix*, 78 L. T. 445, 448, 449.

(*m*) *Hardman v. Booth*, 1 H. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Cowdy v. Lindsay*, 3 App. Cas. 459; *Re Cooper*, 20 Ch. D. 611; and see *Gordon v.*

Street, 1899, 2 Q. B. 641, where the defendant only pleaded that the contract was voidable for fraud, but might, it seems, have alleged that it was void on the ground of mistake.

(*n*) Above, p. 753.

(*o*) See above, p. 750, n. (*h*).

(*p*) See *Smith v. Hughes*, L. R. 6 Q. B. 597; see below, pp. 773, 774.

Smith v.
Wheatcroft.

the latter be not a material element in determining his intention, he cannot avoid the contract on the ground of his mistake. Thus, where B. bought land of A., ostensibly on his own account but really as agent for C., and it appeared that A., provided he got his price, would have been equally willing to sell to any other person, it was held that A. could not resist the specific performance of the contract (g).

Mistake as to
the property
sold or the
price.

The same rule holds, subject to the same qualification, with regard to mistake in respect of the property to be sold or the price to be paid, if the mistake go to the whole substance of the consideration (r). Thus, if A. sell to B. his farm called The Grange, and A. have two farms of that name, one in Essex and one in Hampshire, and A. intended to sell his farm in Essex, but B. meant to buy the farm in Hampshire, there is no true consent and no contract between the parties. In this case there is a latent ambiguity in the description of the land purported to be sold, and so parol evidence is admissible to prove what land the parties intended to sell, and it may be shown that they meant different things and their minds were not at one (s). But if one sign a contract for the purchase of a piece of land, of which the description in the contract is free from ambiguity and completely identifies it, he will be estopped from proving that he really intended to buy a different plot, if his mistake were due to his own inadvertence, and his outward acts and demeanour would naturally and reasonably lead the other party to suppose

(g) *Smith v. Wheatcroft*, 9 Ch. D. 223; *Nash v. Dix*, 78 L. T. 445, 448, 449; *Gordon v. Street*, 1899, 2 Q. B. 641, 647.

(r) Above, pp. 748—753.

(s) *Raffles v. Wichelhaus*, 2 H. & C. 906 (sale of goods ex Peerless, there being two ships of

that name); above, n. (i) to p. 750. See *Altham's case*, 8 Rep. 150b, 155; *Miller v. Travers*, 8 Bing. 244, 248; *Doe d. Gord v. Needs*, 2 M. & W. 129, 139, 140; *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363, 368, 369; below, p. 782, n. (a).

that he meant to buy the land described (*t*). On this point, as affecting the validity of the contract at law, the *dictum* of Collins, M. R., in the case of *Van Praagh v. Everidge* (*u*), is, it is submitted, misleading. The defendant in that case, purely through his own inadvertence, bid at an auction for Lot 1 under the impression that he was bidding for Lot 2, and Lot 1 was knocked down to him accordingly. He afterwards declined to sign a memorandum of the contract: but the auctioneer signed it for him (*x*). The memorandum so signed ascribed a wrong date to the contract. The vendor sued for specific performance of the contract, which was granted by Kekewich, J. This involved the decision that there was a contract valid at law, as the Court has no jurisdiction to grant specific performance of a void agreement (*y*). In the Court of Appeal, however, the judgment of Kekewich, J., was reversed purely on the ground that, as the wrong date had been inserted in the contract, there was no sufficient memorandum to satisfy the Statute of Frauds (*z*). But it had also been argued that there was no true consent of the parties, their minds being directed to different things. On this point, Collins, M. R., said: "It is not clear to my mind that the parties ever were *ad idem*; I do not think that they were, but it is unnecessary to say anything further about that, as the plaintiff's case fails on the other point." This was a most unfortunate remark; it gives the impression that, if the memorandum had been sufficient to satisfy the statute, there would nevertheless have been no contract between the parties, because their minds were not at one; and the reporter has done his best to fix this impression by recording it in the headnote with a *semble*. But it is submitted that the

*Van Praagh
v. Everidge.*

(*t*) *Tamplin v. James*, 15 Ch. D. 215.

(*u*) 1903, 1 Ch. 434, 436, reversing *S. C.*, 1902, 1 Ch. 266.

(*x*) See above, p. 21, n. (*r*).

(*y*) Fry, *Sp. Perfee.* §§ 277, 752, 3rd ed.

(*z*) See above, pp. 4, 8, and n. (*f*).

learned judge overlooked the qualification above mentioned to the rule of law, that true consent is necessary to make a contract, and did not consider whether the defendant was not estopped from proving his real intention. And it is contended that, if the defendant so conducted himself (as apparently he did) that the auctioneer would naturally and reasonably infer that he meant to bid for Lot 1, then it was not open to him, if sued upon the apparent contract at law, to show that the intention which he had so manifested was not his true intention (*a*). A contract for the sale of land may also be void for want of true consent owing to a mistake as to the price. This may occur where one bids at an auction under a misapprehension as to the amount of his bidding (*b*); but in any such case the facts would be likely to raise the question whether the party mistaken were at liberty to prove his real intention or were estopped by his conduct and outward demeanour from doing so. It seems that upon a sale of lands, as on a sale of goods, any mistake in the physical contents or quantity of the thing sold or the price, must necessarily go to the whole substance of the consideration at law; since a contract is broken at law in case of the smallest deficiency in quantity of the thing promised (*c*). And the same appears to be true of a mistake as to quantity of estate or title; as where one thought he was buying unincumbered freehold and the other intended to sell copyhold, or leasehold, or land subject to restrictive covenants; for, as we have seen (*d*), it is an essential

Mistake as
to price.

Mistake as to
the property
or price goes
to the root of
the contract.

(*a*) Above, pp. 750—756, 759. It is further submitted that, according to the case of *Tamplin v. James*, 15 Ch. D. 215, the fact that the parties' minds were not in truth at one, was not of itself alone a sufficient ground for the defendant to resist specific performance, the mistake having been on his side only; and that, in the absence of hardship, he would

have been equally estopped in equity from alleging his mistake; see below, pp. 774—776.

(*b*) See *Phillips v. Bistolli*, 2 B. & C. 511, 512; Benjamin on Sale, 43, 2nd ed.

(*c*) See above, p. 722, and n. (*m*); *Stewart v. Kennedy*, 15 App. Cas. 108, 121; cf. above, p. 727.

(*d*) Above, pp. 32, n. (*b*), 194—197.

condition of the sale of land that the vendor show a good title. But a mistake as to the quality of the thing sold does not necessarily avoid the contract of sale; for a warranty of quality is not an essential element of a sale; it is a collateral engagement to be attached to or omitted from it at the pleasure of the parties (*e*). It appears, however, that an apparent contract may be void on account of a mistake as to the quality of the thing sold, if the quality were an essential condition of the sale in this sense, that the party mistaken would not have entered into the contract at all unless he was to have a thing of that quality, which he erroneously supposed to be promised to him (*f*).

Mistake as to quality.

Warranty of quality.

With regard to mistakes in what may be termed the quality of land sold, as for example, whether it be fit for growing corn, grazing cattle, or for building, or whether a house or other building be in good repair or well drained, the reader must bear in mind the following distinctions:—The rule is *caveat emptor*. The purchaser should inspect and make inquiry concerning the property which he is buying (*g*). If he omit this precaution, he buys at his own risk, and cannot complain of defects in the quality of the thing, unless they be not discoverable by inspection and materially interfere with the enjoyment promised by the contract (*h*), or by any representation which induced the contract, or be fraudulently concealed (*i*). In the case of the sale of land, defects which are in one sense defects of quality, as interfering with the physical enjoyment of the land sold, may

Mistake as to the quality of a thing sold.

The rule is *caveat emptor*.

Defect of quality amounting to a defect of title.

(*e*) See *Scott v. Littledale*, 8 E. & B. 815; *Benjamin on Sale*, 45, 2nd ed. For an instance of a collateral warranty on a sale of land, see *De Lassalle v. Ginehdorf*, 1901, 2 K. B. 215 (warranty that the drains of a house were in good order).

(*f*) See *Smith v. Hughes*, L. R. 6 Q. B. 597, 607—611; *Stewart v. Kennedy*, 15 App. Cas. 108, 121.

(*g*) *Edwards-Wood v. Mayor-banks*, 7 H. L. C. 806, 809—811; *Sug. V. & P.* 335; above, p. 610.

(*h*) Above, p. 611.

(*i*) See below, p. 769.

No warranty
of quality
implied by
the sale of
land.

Latent defects
of quality.

Unknown
latent defects.

involve a breach of the contract because they are inconsistent with the discharge of the vendor's obligation of showing a good title. Thus the existence of a right of way, not discoverable by inspection and interfering materially with the enjoyment of the property sold, is a good ground of objection to the title (*k*). But in the absence of fraud, a defect of quality, not amounting to a breach of the obligation to show a good title, is no ground of objection on the purchaser's part, unless the vendor expressly or impliedly warranted or promised that the property sold should have the quality, in which it is deficient. And no warranty is implied by the mere sale of land that it is fit for any particular purpose (*l*). For example, if one sell a house which is out of repair, or ill-drained or infested with vermin or otherwise unfit for human habitation, without warranting or representing that it is in good repair, well-drained or fit for habitation, the purchaser has no legal or equitable cause of complaint (*m*). This doctrine applies not only to defects discoverable by inspection or inquiry but also to latent defects of quality. Where these are unknown to the vendor, and do not materially interfere with the enjoyment promised by the contract, or any representation which induced the contract, they are no ground for the purchaser to avoid the contract or resist its specific performance (*n*). And the same

(*k*) *Ashburner v. Sewell*, 1891, 3 Ch. 405; above, p. 611. See also *Wilde v. Gibson*, 1 H. L. C. 605, where the defect, if discovered before conveyance, would certainly have been a good ground of objection to the title; above, pp. 611, 653, 654.

(*l*) *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, ib. 68; *Keates v. Cadogan*, 10 C. B. 591; *Spoor v. Green*, L. R. 9 Ex. 99, 109; *Wilson v. Finch Hatton*, 2 Ex. D. 336, 342, 343. These are all cases of agreement to lease land: but

the principle is exactly the same in the case of an agreement to sell land; see above, p. 97, n. (*m*). And the case of a lease seems stronger than that of a sale, since occupation leases are generally taken with the object of using the land in some particular way, as farming it.

(*m*) *Keates v. Cadogan*, 10 C. B. 591; *Cook v. Waugh*, 2 Giff. 201; *Cavalier v. Pope*, 1905, 2 K. B. 757, 763, 764, affirmed, 1906, A. C. 428.

(*n*) *Lucas v. James*, 7 Hare, 410,

rule applies at law, although the latent defect be known to the vendor. Thus if one sell his house situate in a street of a disreputable character, the purchaser cannot avoid the contract at law, unless the vendor sold the house as a residence for a respectable family or otherwise promised or represented that it was fit for that purpose (*o*). *A fortiori*, if land or a house be sold with all its faults (*p*) or with all risks of error in the description (*q*), the purchaser cannot reject it on account of a latent defect of quality, of which the vendor was aware. In equity, however, the rule has been suggested that a latent defect of quality, which is not discoverable by any inspection or inquiry that a prudent purchaser might reasonably be expected to make, and is known to and not disclosed by the vendor, is a good ground for refusing to grant specific performance at the vendor's suit (*r*). But it is submitted

Latent defect known to the vendor.

Sale of a thing with all its faults.

The rule in equity as to mere silence about a defect of quality.

418; see *Hope v. Walter*, 1899, 1 Ch. 879, 883, reversed, 1900, 1 Ch. 257; below, p. 770.

(*o*) See *Parkinson v. Lee*, 2 East, 314, 322, 323, 324; *Bywater v. Richardson*, 1 A. & E. 508; *Chanter v. Hopkins*, 1 M. & W. 399; *Cornfoot v. Fawke*, 6 M. & W. 358 (the correctness of the decision in this case is discussed in the next Chapter: but it seems clear that if there had been no representation at all, there would have been no cause of action); *Gompertz v. Bartlett* 2 E. & B. 849, 855; *Jones v. Just*, L. R. 3 Q. B. 197, 202; *Ward v. Hobbs*, 4 App. Cas. 13, 24, 25, 26, 29. It is respectfully submitted that the *dictum* of Joyce, J., in *Cartish v. Salt*, 1906, 1 Ch. 333, 341, as to the vendor's duty of disclosure, is not well founded; see the writer's criticism in 50 Sol. J. 611. Note that the statement in *Horsfall v. Thomas*, 1 H. & C. 99, 100, as to a manufacturer's duty to disclose a defect known to him and not discoverable by inspection applies only to a contract to make a particular

thing to order, when there is an implied warranty that it shall be reasonably fit for the purpose for which it is ordinarily used or specially ordered; *Jones v. Just*, L. R. 3 Q. B. 197, 203; *Benjamin on Sale*, 525, 2nd ed. *Horsfall v. Thomas* does not therefore support the proposition in Fry, Sp. Perf. § 708, 3rd ed., for which it is vouched.

(*p*) *Baglehole v. Walters*, 3 Camp. 154; *Pickering v. Dowson*, 4 Taunt. 779; *Ward v. Hobbs*, 4 App. Cas. 13; *Benjamin on Sale*, 384, 2nd ed.; Sug. V. & P. 333, where note that the proposition stated at the beginning of § 21 cannot be maintained; see n. (*r*), below.

(*q*) *Braund v. Garaball*, 5 App. Cas. 925.

(*r*) *Lucas v. James*, 7 Hare, 410, 418; *Hope v. Walter*, 1899, 1 Ch. 879, 883. Note that the rule there stated is qualified with "perhaps"; and that the statement of the law in Sug. V. & P. 2, 333, which the rule purports to follow, was apparently founded on a case of *Mellish v. Mottoux*,

*Lucas v.
James.*

that this rule is too broadly stated, and is properly subject to the qualification that the defect must be such as will materially interfere with the enjoyment *promised by the contract* or the vendor's representation, or the concealment must be fraudulent. Thus in *Lucas v. James* (s), where the rule is stated, a gentleman entered into negotiations for taking a lease of a house, the lessor being aware that he wanted it for his own residence. He broke off the negotiations on the ground that the street, in which the house was situated, was of so disreputable a character that the house was unfit for the purpose of a gentleman's private residence. The lessor brought a suit for specific performance, alleging that a contract had been concluded. Wigram, V.-C., dismissed the bill with costs on the ground that no contract had been formed: but incidentally he suggested the rule as above mentioned. But it appears that in that case the lessor was clearly promising a house fit for the required purpose. If one sell a house situate next door to a house known to the vendor but not generally known to be a disorderly house, without promising that the house sold is fit for a gentleman's residence, and without making any promise or representation at all as to the character of the neighbourhood or the street, why should specific performance be refused at the vendor's suit? Lord St. Leonards maintained that the vendor's silence as to a known latent defect of quality could hardly be distinguished from his active concealment of a defect which would otherwise be patent (t). But it is held at law that this is not so (u). The active concealment alone is a fraud; mere silence is no breach of any legal duty, unless the vendor

Peake, 115, expressly overruled in *Baglehole v. Walters*, 3 Camp. 154; and *Pickering v. Dowson*, 4 Taunt. 779. 1 Dart, V. & P. 93, 5th ed.; 103, 6th ed.; 101, 7th ed., simply follows Sugden's

statement.

(s) 7 Hare, 410.

(t) Sug. V. & P. 333, 334: but see p. 335.

(u) Above, p. 765, and n. (o); below, p. 772.

promised some quality incompatible with the existence of the defect, or were under a particular obligation to disclose defects, such as arises in the case of a contract of insurance, which is a contract *uberrima fidei* (x). And it is stated by Sir Edward Fry in his treatise on Specific Performance that mere silence as regards a material fact, which one party is not under an obligation to disclose to the other, cannot be a ground for rescission of a contract or a defence to specific performance (y). And this rule has been lately followed in equity, specific performance having been decreed at suit of one, who kept silence as to a latent defect, which was known to him, but which he had not warranted or represented not to exist (z). So also it is considered that mere silence on the purchaser's part as to some fact known to him alone and enhancing the value of the property sold (such as the existence of valuable minerals) is no ground in equity for the vendor to avoid or resist specific performance of the contract (a). At the same time, it must be remembered

Silence of the purchaser about a fact enhancing the value.

(x) See *Expte. Whittaker*, L. R. 10 Ch. 446; *Brownlie v. Campbell*, 5 App. Cas. 925, 932, 937, 938, 944, 950, 954. As to the dictum of Joyce, J., in *Carlisle v. Salt*, 1906, 1 Ch. 335, 340, see above, p. 765, n. (a).

(y) Fry, Sp. Perf. §§ 705, 713, 3rd ed.

(z) *Turner v. Green*, 1895, 2 Ch. 205, where specific performance of an agreement to compromise an action was enforced at suit of one, who had, on making the agreement, kept silence as to the fact that he had just been defeated in a step in the proceedings; *Greenhalgh v. Broadley*, 1901, 2 Ch. 324, where specific performance was enforced at suit of a vendor, who had sold a house with windows overlooking a stranger's land, and had not mentioned that he only enjoyed

access of light by the stranger's licence; see above, p. 639, n. (b); *Re Ward and Jordan's Contract*, 1902, 1. R. Ch. 73; *Seddon v. North Eastern Salt Co., Ltd.*, 1905, 1 Ch. 326, 334, 335.

(a) *For v. Mackenzie*, 2 Bro. C.C. 400, 420; *Turner v. Harvey*, Jac. 169, 178; *Walters v. Morgan*, 3 De G. F. & J. 718, 723; *Cookes v. Boswell*, 11 App. Cas. 232, 235, 236; *Perceval v. Wright*, 1902, 2 Ch. 421, 426; Sug. V. & P. 5; 1 Dart. V. & P. 106, 5th ed.; 118, 6th ed.; 114, 7th ed.; Fry, Sp. Perf. §§ 713, 714, 3rd ed. It is submitted that the dictum of Kindersley, V.-C., to the contrary in *Fulde v. Gray*, 4 Drew. 651, 5 Jur. N. S. 645, 646, is opposed to the main current of authority and would not now be followed; see Fry, Sp. Perf. §§ 444—446, 3rd ed.

Specific performance may be refused on grounds of unfairness or hardship.

Non-disclosure of a fact material to the title.

that in granting or refusing the remedy of specific performance, the Court may take into consideration circumstances which would be of no account at law and would not affect the question of the rescission of the contract (*b*). Thus the Court may refuse specific performance at suit of a party whose conduct has been wanting in good faith or fairness (*b*), or against a party on whom the specific performance of the contract would inflict a great hardship (*c*); and it seems that on these grounds the Court *may possibly* decline to grant specific performance at suit of either vendor or purchaser, who has concealed a fact known to him and material to the value of the property sold, notwithstanding that such concealment may not amount to positive fraud (*d*). In a recent case, however, where a vendor kept silence in a manner which the Court considered to be unfair, that was not allowed to stand in the way of his obtaining the remedy of specific performance, though it was made a ground for depriving him of costs (*e*). But it should be noted that non-disclosure, on the sale of land, of a fact material to the *title* of the property sold stands on a different footing from non-disclosure of a fact relating to its *quality*. The vendor's title is a matter which is exclusively within his own knowledge, and he is bound to state it fairly; and his suppression of a fact material to the title may, according to the degree in which it

(*b*) Above, pp. 37, 38; below, n. (*d*), and pp. 777, n. (*e*), 778, n. (*f*).

(*c*) See *Wedgwood v. Adams*, 6 Beav. 600; *Watson v. Marston*, 4 De G. M. & G. 230; *Fulke v. Gray*, 4 Drew. 651, 659; *Webster v. Cecil*, 30 Beav. 62; *Durham v. Legard*, 34 Beav. 611; *Preston v. Luck*, 27 Ch. D. 497, 506; *Rudd v. Lascelles*, 1900, 1 Ch. 815, 820; *Goddard v. Jeffreys*, 30 W. R. 269, 270; *Van Praagh v. Everidge*, 1902, 2 Ch. 266, 271, reversed on other grounds, 1903, 1 Ch. 434; above, p. 39; below, p. 776.

(*d*) See *Ellard v. Llandaff*, 1 Ball & B. 241, where a lessee for a life negotiating for a new lease concealed the fact that *cestui que vie* was at the point of death: this decision is, however, adversely criticised in *Turner v. Green*, 1895, 2 Ch. 205; *Fothergill v. Phillips*, L. R. 6 Ch. 770, where a purchaser concealed the fact that he had wrongfully abstracted a large quantity of minerals from under the land sold; Fry, Sp. Perf. §§ 402, 715, 717, 3rd ed.

(*e*) *Greenhalgh v. Brindley*, 1901, 2 Ch. 324.

affects the title, be a ground for rescinding the contract or for resisting its specific performance (*f*).

On the other hand, if the vendor represent that a house is in good repair (*g*), or is not damp (*h*), or that the drains are in good order (*i*), or the cellars dry (*k*), or that a farm is in a high state of cultivation (*l*), or sell land as being fit for building purposes (*m*), or as business premises (*n*), then any latent defect, which prevents this representation from being fulfilled, will be a good ground of objection by the purchaser to his completing the contract (*o*). If, however, the defect were patent or obvious, then the purchaser may be obliged to perform the contract, notwithstanding the representation, on the ground that he must be taken to have bought with notice of the defect (*p*). But any active concealment of defects which would otherwise be discoverable by inspection is a fraud (*q*); and if a purchaser be deceived thereby (*r*) he may avoid the contract

Representation that land is fit for a particular purpose.

Representation obviously inapplicable.

Active concealment of defects.

(*f*) *Edwards v. Wickwar*, L. R. 1 Eq. 68; *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145; *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Heywood v. Mallatieu*, 25 Ch. D. 357; *Nottingham Brick and Tile Co. v. Butler*, 16 Q. B. D. 778; *Reeve v. Berridge*, 20 Q. B. D. 523, 528; *Re Davis and Carey*, 40 Ch. D. 601; *Re White and Smith's Contract*, 1896, 1 Ch. 637; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666; *Carlisch v. Salt*, 1906, 1 Ch. 335, as to which case see the writer's criticism in 50 Sol. J. 611; above, pp. 73, n. (*l*), 77, 78, 196—198, 205, 351, 608, n. (*q*).

(*g*) *Grant v. Munt*, G. Coop. 173; *Dyer v. Hargrave*, 10 Ves. 505; *Cree v. Stone*, Times Newspaper, 10th May, 1907.

(*h*) *Strangways v. Bishop*, 29 L. T. O. S. 120.

(*i*) *De Lussalle v. Guildford*, 1901, 2 K. B. 215; *Cree v. Stone*,

Times Newspaper, 10th May, 1907.

(*k*) *Lamare v. Dixon*, L. R. 6 H. L. 414.

(*l*) *Dyer v. Hargrave*, 10 Ves. 505.

(*m*) *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258; *Dougherty v. Oates*, 45 Sol. J. 119.

(*n*) *Re Davis and Carey*, 40 Ch. D. 601; above, p. 205.

(*o*) Above, pp. 610—612.

(*p*) Above, p. 612; *Dyer v. Hargrave*, 10 Ves. 505, 508; *Grant v. Munt*, G. Coop. 173, 177; Sug. V. & P. 331, 332.

(*q*) *Pickering v. Dawson*, 4 Taunt. 779, 785; *Schneider v. Heath*, 3 Camp. 506, 508.

(*r*) See *Horsfall v. Thomas*, 1 H. & C. 90, dissented from by Cockburn, C. J., *Smith v. Hughes*, L. R. 6 Q. B. 597, 605, and doubted in Benjamin on Sale, 385, 2nd ed. The decision seems, however, to be in accordance with

Misleading
conduct.

Specific
performance
may be
resisted in
some cases
where the
contract
cannot be
rescinded.

Hope v.
Walter.

accordingly. Thus if cracks in the walls of a house be papered or painted over with intent to conceal them, and the house be then sold, though without any warranty or verbal representation as to its state of repair, to a purchaser, who has inspected it, the contract is voidable for fraud (*s*). And any conduct calculated to mislead a purchaser with respect to some material fact, or to divert him from inspection or inquiry, which would discover a defect known to the vendor, is equally fraudulent, and may be a ground for avoiding the contract at law as well as resisting its specific performance (*t*). It should be noted that an innocent misrepresentation as to the quality of land sold may be a good ground for the purchaser to resist the specific performance of the contract, notwithstanding that it be insufficient to procure the contract to be rescinded (*u*). Thus where a house let on a quarterly tenancy was sold as an eligible freehold property for investment, but was being used, unknown to the vendor, as a brothel, the Court of Appeal refused to oblige the purchaser to perform the contract specifically, but also declined to rescind the contract (*x*). The reason given by the Court was that the purchaser, if forced to complete, would be liable under the Criminal Law Amendment Act, 1885, to be fined unless he evicted the tenant. It is submitted that this decision must be referred, in principle, to the ground that the defect was incompatible with the enjoyment *promised by the contract*, coupled, possibly, with that of great hardship on the purchaser (*y*). A property, from which the rent-paying occupier must be

the law laid down in the cases cited above, p. 765, nn. (*o*), (*p*), and by Selborne, C., in *Coaks v. Boswell*, 11 App. Cas. 232, 236. And see Pollock on Torts, 285, 5th ed.

(*s*) See Sug. V. & P. 333—335.
(*t*) *Walters v. Morgan*, 3 De G. F. & J. 718, 724; *Coaks v. Boswell*, 11 App. Cas. 232, 235, 236.

(*u*) See *Kennedy v. Panama, &c.*

Mail Co., L. R. 2 Q. B. 580; *Re Banister, Broad v. Manton*, 12 Ch. D. 131; above, pp. 199, 204—210.

(*x*) *Hope v. Walter*, 1900, 1 Ch. 257, reversing the decision of Cozens-Hardy, J., 1899, 1 Ch. 879, as to specific performance, and affirming it on the other point.

(*y*) Above, pp. 764, 769.

immediately ejected, on pain of the purchaser becoming liable to criminal proceedings, hardly fulfils the expectation of enjoyment, which is raised by the description of an eligible freehold property for investment (z). Or perhaps the principle may be put in this way—that the Court will not enforce the specific performance of a contract to purchase a thing, which is *positively noxious* in quality, notwithstanding that there were no warranty of quality, and that in other respects the thing answer the description. For example, a house may be so ill-drained that it is dangerous to live in it; the vendor may be aware that illness has been actually caused by the state of the drains and maintain silence in this respect; and yet the purchaser may be unable to avoid performance of the contract. He buys at his own risk; he ought to have the drains tested for himself; and drains may be tested and put right without any extraordinary danger to the workmen (a). If, however, a house were infected with the germs of disease, such as plague or smallpox, so that any person entering it must incur the danger of catching the malady, and the vendor concealed this fact, it is thought that he could not enforce specific performance; for the thing sold was actively harmful (b). The house might indeed be disinfected, but only at the risk of the health and life of those who entered it to do so. It appears therefore that where one has bought land or a house under a mistaken impression as to its quality, he must in general abide by the consequences of his own mistake, unless the vendor made by warranty or representation some promise as to the quality, or actively concealed some defect which was known to him.

Specific performance not granted where the thing sold is *positively noxious* in quality.

Purchase under a mistaken impression as to quality.

(z) See *Hope v. Walter*, 1900, 1 Ch. 259.

(a) See above, pp. 763—767.

(b) See *Carfoot v. Fuchs*, 6 M. & W. 358, 380, 381; *Chester v. Powell*, 52 L. T. 722, 723. But

apparently this fact would not be sufficient ground for rescinding the contract; see above, p. 765 and n. (c); *Ward v. Hobbs*, 4 App. Cas. 13, 24, 25, 29.

Vendor not bound to disabuse purchaser of his erroneous belief as to the quality of the thing sold.

Not only is there no legal obligation upon a vendor of land to disclose to the purchaser any defects known to him in the quality of the thing sold, but further the vendor is not bound to disabuse the purchaser of any erroneous belief, which the purchaser has formed, and which the vendor knows that the other has formed, as to the quality of the purchased property (*c*). A vendor may well sell a house, which has got dry rot in all the wood-work and is badly drained, to a purchaser, who knows nothing of these defects, but believes to the knowledge of the vendor that the house is in good repair and well drained, and yet the purchaser will not be entitled to claim the rescission of the contract; provided always that the vendor made no representation as to the quality of the thing sold, and did not actively conceal the defect. And this is equally the case, even though the purchaser suppose the vendor to be warranting the quality of the thing sold, provided that the vendor were not aware of the purchaser's belief in this respect and had done nothing to induce it. So long as the vendor knows no more than that the purchaser is mistaken as to the quality, the purchaser's further erroneous belief that the vendor is warranting the quality is no ground for his avoidance of the contract (*d*). And it does not appear that the above circumstances, namely, the vendor's knowledge of the purchaser's erroneous belief or the purchaser's further mistaken impression that the vendor is warranting the quality (if not known to the vendor), are of themselves a sufficient ground to enable the purchaser to resist the specific performance of the contract (*e*), unless he can move the Court on the grounds

It does not alter the case that the purchaser believed the vendor to be warranting the quality, if the vendor did not know this.

(*c*) *Keates v. Cadogan*, 10 U. B. 591; *Edwards-Wood v. Majoribanks*, 7 H. L. C. 806, 809; *Smith v. Hughes*, L. R. 6 Q. B. 597, 607; Fry, Sp. Perf. §§ 705, 713, 3rd ed.; *Turner v. Green*, 1895,

2 Ch. 205.

(*d*) See *Smith v. Hughes*, L. R. 6 Q. B. 597.

(*e*) See cases cited above, p. 767, n. (z).

of unfairness or hardship (*f*). If, however, the vendor know that the purchaser believes him to be warranting the quality of the thing sold, and agree to the contract without the intention of warranting according to the purchaser's expectation, but without disabusing the purchaser of his belief, in that case there is no true consent of the parties, and on this ground the contract is void (*g*). The same law seems applicable where one, who knows that there is a mistake in the terms of an offer, accepts it unconditionally and without correcting the mistake, being minded to take advantage of the other's error. Thus if A. offer to sell to B. Blackacre and Whiteacre for 2,000*l.*, and B., knowing that A. really means to offer Blackacre only or to ask 4,000*l.*, but intending to hold A. to the letter and not to the spirit of his proposal, at once close with the offer, it is thought that A. is not estopped from proving his mistake, and the contract is void for want of true consent. For B. knew that A. thought that B. was promising to take Blackacre only or to pay 4,000*l.*; and he ought not to have sought to take advantage of such a mistake (*h*). In a case like this the acceptance of the offer, with knowledge of the mistake in its terms, appears to be plainly fraudulent; and the acceptor may not take advantage of his own wrong. The other party therefore has the choice of two alternatives. He may either treat the contract as altogether void by reason of his mistake, or he may affirm and enforce the contract according to the terms which he had really intended to propose,

But if the vendor knew of this belief, the contract is void for want of true consent.

Acceptance of an offer which the acceptor knows to be mistaken.

(*f*) Above, p. 768.

(*g*) *Smith v. Hughes*, L. R. 6 Q. B. 597.

(*h*) See *Webster v. Cecil*, 30 Beav. 62, as explained in *Timplin v. James*, 15 Ch. D. 215, 221; *Paget v. Marshall*, 28 Ch. D. 255, 265. The case appears to be governed by the same principle as is applied in holding that a

man is not bound by the exact terms of a description or representation which he has put forward or made to another, where the other has notice that its terms are inaccurate; above, pp. 612, 769, and *n. p.*; *Calverley v. Whithams*, 1 Ves. jun. 210; *Townshend v. Stanger*, 6 Ves. 328, 341.

treating the acceptance as an assent to a contract, of the real terms of which the acceptor had notice, and claiming to have the written agreement rectified on account of a mistake *common to both parties* in the expression of its terms. And if he choose this alternative, the acceptor will be estopped by his conduct from setting up the want of true consent as a ground for avoiding the contract, or from objecting to rectification on the ground that the mistake was made by the other party alone, and was not common to both of them (*i*).

Mistake as
avoiding true
consent in
equity.

So far, in discussing the subject of mistake as excluding any true consent between the parties, and so avoiding the contract altogether, we have dealt mainly with the rules of the common law (*k*). Where the contract is void on this ground, the parties are in the same position in equity as at law. There can be no question of any order for specific performance of the contract, for this remedy is, as we have seen (*l*), only granted to enforce a valid contract. But where one party has entered into the contract under a mistake, which is not shared by the other, and the one is estopped at law from setting up his mistake and proving his true intention, the parties are not always in the same position, as regards the equitable remedies to enforce the contract, as they are at law. Thus where the vendor makes a mistake in the preparation of the particulars of sale, and includes therein more than he really meant to sell (*m*), but the description is precise, so that a man would naturally and reasonably suppose that the vendor meant to sell what he actually offered,

Unilateral
mistake in
equity.

(*i*) See *Garrard v. Frankel*, 30 Beav. 445; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Bloomer v. Spittle*, L. R. 13 Eq. 427; *Payet v. Marshall*, 28 Ch. D. 255; as explained in *May v. Platt*, 1900, 1 Ch. 616, 623; Pollock on Contract, 495,

7th ed.; below, pp. 794 sq.

(*k*) Above, pp. 749 sq.

(*l*) Above, p. 761.

(*m*) See *Re Fawcett and Holmes*, 42 Ch. D. 150; above, p. 728; *May v. Platt*, 1900, 1 Ch. 616.

the contract is enforceable against the vendor at law, since he would be estopped from proving his mistake (*n*). The vendor is also estopped from setting up his mistake in equity to this extent, that he is not entitled to claim the rescission of the contract (*o*), or to insist himself on its specific performance, except on the terms of conveying the whole of the property described, if he be able to do so (*p*). If he be not, he may, as we have seen (*q*), enforce specific performance with an abatement of the purchase money, where the deficiency is insubstantial or the contract contained an express stipulation as to compensation for misdescription. But if the purchaser sue for specific performance of the contract, then the vendor may in certain circumstances be entitled to set up his mistake as a defence to the action. This is owing to the discretionary nature of the remedy of specific performance, and to the fact that in granting or withholding such relief the Court will have regard to circumstances outside the contract and especially to the conduct of the parties, and may refuse specific performance on the ground of great hardship (*r*). But it is not in every case that a party sued for specific performance may avail himself of his own mistake as a defence to the action. If the mistake were entirely due to the defendant's own carelessness or inadvertence, the plaintiff having done nothing to induce or contribute to the error, nor having sought knowingly to take advantage of it, and if it will inflict no great hardship on the defendant to enforce him to perform the contract specifically, then it appears that the defendant will be equally precluded from resisting specific performance in equity as from avoiding his liability at law (*s*). Thus

n) Above, pp. 750, 753, 755, 759.
o) *Abenden v. Kimbird*, 2 Mac. & G. 1, 7, 8; *Scott v. Littlejohn*, 8 E. & B. 815.
p) *Manser v. Rack*, 6 Hare, 443, 447, 448; *Abenden v. Kim-*

murd, 2 Mac. & G. 1, 8.
q) Above, pp. 723, 727 - 729.
r) Above, pp. 39, 768.
s) *Tamplin v. James*, 15 Ch. D. 215; *Goodland v. Jeffreys*, 30 W. R. 269, 270.

Specific performance against a party mistaken may be refused on the ground of hardship.

where the vendor has in these circumstances inadvertently included in the particulars of sale more than he meant to sell, he will nevertheless be obliged at the purchaser's suit to perform the contract specifically, and must convey the whole property described, if he can; or if he cannot, he must convey what he can with a proportionate abatement of the price (*t*). So it appears that, in the like circumstances, a purchaser who has by his own mistake signed a contract to buy a property smaller than he supposed it was (*u*), or even different from that which he intended to buy (*x*), cannot resist specific performance on the ground of his mistake. But where it would be a great hardship on the party mistaken to oblige him to perform the contract specifically, the Court will not grant this relief to the other party, but will leave him to pursue his remedy at law (*y*). Thus where one wrote a letter offering by mistake to sell his land for 1,250*l.*, meaning

(*t*) *Mackenzie v. Hesketh*, 7 Ch. D. 675; *Dyos v. Stafford*, 7 L. R. 1r. 590, 605, 606.

(*u*) *Tamplin v. James*, 15 Ch. D. 215; *Goddard v. Jeffreys*, 30 W. R. 269.

(*x*) *Van Praagh v. Everidge*, 1902, 2 Ch. 266, Kekewich, J., reversed on other grounds, 1903, 1 Ch. 434 (above, p. 761), following the rule laid down in *Tamplin v. James*, *ubi sup.* in preference to the decision in *Malins v. Freeman*, 2 Keen, 25, where specific performance was refused at the vendor's suit in exactly the same circumstances. But note that Kekewich, J., held that in the circumstances of the case before him it was no great hardship to enforce specific performance against the purchaser, and expressly recognised that, if this were not so, specific performance might have been refused; see 1902, 2 Ch. 271, 272. It is respectfully submitted, however, that the learned judge was right

in recognising that the case of *Tamplin v. James* set definite limits to the equitable rule expressed of old in the proposition that the Court will refuse specific performance on the ground of mistake (see *Neap v. Abbott*, C. P. Coop. (1837-8), 333; 1 C. P. Coop. t. Cottenham, 382; *Manser v. Back*, 6 Hare, 443, 447, 448). The decision in *Tamplin v. James* shows that the Court will not now refuse specific performance on the ground of unilateral mistake alone, and that, notwithstanding that the parties' minds in making the contract were not *in truth* at one, a defendant to an action in equity for specific performance of the contract may be estopped from saying so. See above, p. 762, and n. (*a*).

(*y*) *Tamplin v. James*, 15 Ch. D. 215, 217, 221; *Goddard v. Jeffreys*, 30 W. R. 269, 270; *Van Praagh v. Everidge*, 1902, 2 Ch. 266, 271, 272.

to say 2,250*l.*, and the offer was accepted, the Court refused to grant specific performance at the purchaser's suit (*z*). And where a vendor has by his own mistake included in the particulars of sale much more than he meant to sell, it appears that the Court may decline, on the ground of hardship, to order the specific performance of the contract at the purchaser's suit, unless he elect to take, without compensation, what the vendor really intended to sell (*a*). So also we have seen that where a vendor has innocently made a serious error of description to his own disadvantage, and has so purported to sell a much larger property than he has, the purchaser will not be entitled to enforce specific performance with compensation, if this would be a great hardship on the vendor (*b*). And where one party has contributed in any way to the other's mistake, as if the particulars of or contract for sale contain any misrepresentation or any ambiguity likely to mislead a man of ordinary intelligence using ordinary care, then the other party may resist the specific performance of the contract on the ground of his mistake (*c*). If the description of the land sold in the written agreement erroneously comprise more than the vendor means to sell, but the purchaser have notice, before or at the time of sale, what land the vendor really intends to part with, the purchaser cannot enforce the specific performance of the contract according to the written description; for the vendor may in defence prove by evidence outside the written agreement that it does not express

Where one has contributed to the other's mistake.

Where one has notice of an error in the particulars.

(*z*) *Webster v. Cecil*, 30 Beav. 62; see above, p. 773; *Wood v. Searth*, 2 K. & J. 33.

(*a*) *Alvanley v. Kimbaird*, 2 Mac. & G. 1. 7; *Ducham v. Legard*, 34 Beav. 611, 614; *Rudd v. Lascelles*, 1900, 1 Ch. 815, 820; above, p. 724.

(*b*) Above, p. 726.

(*c*) *Higginson v. Clowes*, 15 Ves. 516; *Swainland v. Dearsley*, 29 Beav. 430; *Tamplin v. James*, 15 Ch. D. 215, 216, 221; *Goddard v. Jeffreys*, 30 W. R. 269, 270; *Van Praagh v. Everidge*, 1902, 2 Ch. 266, 271, 272.

Where one knew of the other's mistake and sought to take advantage of it.

the parties' true intention (*d*). And as we have seen (*e*), if in such case the vendor have no title to the land erroneously comprised in the contract, the purchaser is not entitled to claim specific performance with compensation. If one party were aware of the other's mistake and wrongfully took advantage of it, he cannot enforce the specific performance of the contract against the party mistaken (*f*). Indeed in this case, as we have seen (*g*), it may be contended that the contract is void at law.

Common mistake as to some fact which is a condition precedent to the formation of a contract.

Not only may a contract be void on account of a mistake excluding any real consent of the parties, where the mistaken party is not estopped from asserting his error (*h*); it may also be void where the parties' minds are really at one as regards the present intention of contracting, but they are under a *common mistake* with respect to some fact, the existence of which is a condition precedent to their uniting in the formation of a contract. On this ground a contract for the sale of a thing which both parties believe to be in existence, but which has really ceased to exist, is altogether void (*i*). For example, where an apparent contract is made for the sale of a life estate, both parties believing the tenant for life to be alive, when in truth he is dead, the contract is altogether void; the purchaser may resist its performance; and if it should have been completed by conveyance the conveyance may be set aside, and the purchase money may be recovered as money paid under a mistake of fact (*k*). The same

d, *Galceleg v. Williams*, 1 Ves. jun. 210; *Townshend v. Stangroom*, 6 Ves. 328, 341; above, pp. 729, 769, and n. (*p*); below, pp. 782 *sq.*, 788.

e) Above, p. 726.

f) *Webster v. Cecil*, 30 Beav. 62, as explained in *Tamplin v. James*, 15 Ch. D. 215, 221, 222.

g) Above, p. 773.

h) Above, pp. 749 *sq.*

i) *Hitchcock v. Giddings*, 4 Price, 135; *Strickland v. Turner*, 7 Ex. 208; *Contarier v. Hastie*, 5 H. L. C. 673.

k) See *Hitchcock v. Giddings*, 4 Price, 135; *Strickland v. Turner*, 7 Ex. 208; *Cochrane v. Willis*,

law applies to the sale of an estate in remainder or reversion expectant on a life estate, if made on the basis that the tenant for life is living, when he is in fact dead; or to the sale of a reversion or remainder expectant on an estate tail, if actually barred at the time of sale, the parties supposing it to be still in existence (*l*). So it appears that if a contract be made for the sale of land or a house in the belief that the property is existing in its usual state, the agreement is void if at the time that it was made the land were washed away by the sea, or the house destroyed by fire (*m*). In such cases, however, the thing sold must have been utterly destroyed so as to have ceased to exist at the time of sale; mere deterioration in quality, though unknown to both parties, is not sufficient to avoid the contract, if there remain in existence something which answers to the description of the thing sold (*n*). For example, a contract for the sale of land would not be void if the land were, unknown to the contracting parties, temporarily flooded. And in the case of the sale of a house destroyed by fire, the validity of the contract would appear to depend on the question, whether the house were a principal object of the sale, or were merely accessory to the land sold. Thus the sale of a single house in a town seems to be void if the house were no longer in existence at the time of sale. But on the sale of a large estate, comprising several farms, the fact that some cottage or farm house or building was burnt down before the sale appears to amount to no more than a depreciation in quality and to be insufficient to render the contract altogether void on the ground of common mistake. A

L. R. 1 Ch. 58; *Scott v. Coulson*, 1903, 2 Ch. 249; also *Hood v. McKinnon*, 1909, 1 Ch. 476, stated above, p. 752, n. (*o*).

(*l*) 88, C.C.; *Golyer v. Clay*, 7

Beav. 188.

(*m*) *Hitchcock v. Goldreys*, 1 Price, 135, 141.

(*n*) See *Barr v. Gibson*, 3 M. & W. 590.

Depreciation in quality unknown to the contracting parties.

mere depreciation in quality, which was unknown to both parties at the time of sale, appears to be governed by the same law as applies to the case of unknown latent defects (*o*). If, however, it were an essential condition of the sale that the thing sold possessed a certain quality or were in some particular state of fitness (*p*), then it seems that, in case of a depreciation in quality unknown to both parties at the time of sale, the contract would be void on account of their common error as to a fact which formed the basis of their contracting.

Common mistake as to private right.

For this purpose a mistake in a matter of private right, such as a man's title to some particular piece of land, stands on the footing of a mistake of fact. Thus if A. agree to sell Blackacre to B., both parties believing it to belong to A., and it turn out afterwards that the land really belonged to B., the contract is void, B. may resist its performance either at law or in equity, and if it have been completed, the conveyance may be set aside and the purchase money recovered (*q*).

§ 2.—Of Mistake in the expression of Consent, and its Rectification.

Mistake in the expression of consent.

It has been already mentioned (*r*) that, besides mistake avoiding an apparent contract or conveyance on the ground of want of true consent, there may be mistake in the expression of a true consent; and that in this case the agreement may generally be rectified. We will now consider this subject.

(*o*) Above, p. 764.

(*p*) See above, p. 763.

(*q*) *Bingham v. Bingham*, 1 Ves. sen. 126; *Broughton v. Hutt*, 3 De G. & J. 501; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Jones v. Clifford*, 3

Ch. D. 779; *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.*, 1895, 2 Ch. 275, 281; *Alford v. Walker*, 1896, 2 Ch. 369; *Re Roberts*, 1905, 1 Ch. 704.

(*r*) Above, p. 748.

The rectification of a written instrument (in which form, as we have seen, a contract for the sale of land is required to be made (s)), on the ground of its not expressing, by reason of fraud or mistake, the true intention of all parties thereto, is a matter depending entirely on the jurisdiction of Courts of Equity now vested in the Supreme Court of Judicature (t). And we will begin by reminding the reader that the exercise of this jurisdiction forms an exception to the general rule applied equally in Courts of Law and Equity (u), that extrinsic evidence of the intention of the parties to a written instrument is not admissible to explain or vary the terms of the writing (x). In other words, the general principle is that the parties are not at liberty to prove by evidence outside the instrument that the intention expressed therein was not their intention; or more briefly, that they are bound by the words which they have used in the writing, no matter what they (the parties) meant (y). The result of this general principle is that some matters, which are really errors in the expression of consent, are dealt with by the Courts in the course of their construction or interpretation of written instruments which they are prayed to enforce. Thus the Court will correct all errors which are apparent on the face of any written instrument as a matter of the construction or interpretation of its terms and without admitting extrinsic evidence to explain them (z). So

Rectification of written instruments a matter of the exclusive jurisdiction of Courts of Equity.

An exception to the rule that extrinsic evidence is not admissible to explain or vary written instruments.

Correction of obvious errors.

(s) Above, p. 3.

(t) *Ball v. Storie*, 1 Sim. & Stu. 210, 219; see Wms. Real Prop. 167, 21st ed.

(u) *Pacteriche v. Poulet*, 2 Atk. 383, 384; *Rich v. Jackson*, 4 Bro. C. C. 514, 6 Ves. 334, n.; *Ball v. Storie*, 1 Sim. & Stu. 210, 218, 219; *Bradford v. Romney*, 30 Beav. 431.

(x) *Rutland's case*, 5 Rep. 26; *Preston v. Merceau*, 2 W. Bl. 1249; *Goss v. Nugent*, 5 B. & Ad. 58, 64, 65; *Adams v. Wordley*, 1 M. &

W. 374; *Doe d. Norton v. Webster*, 12 A. & E. 442; *Barton v. Davies*, 10 C. B. 261; *Abrey v. Cras*, L. R. 5 C. P. 37; *Evans v. Roe*, L. R. 7 C. P. 138; *Henderson v. Arthur*, 1907, 1 K. B. 10; see above, pp. 640, 641, 665.

(y) *Doe d. Templeman v. Martin*, 4 B. & Ad. 771, 783, 786; *Doe d. Gwallin v. Gwallin*, 5 B. & Ad. 122, 129; *Rickman v. Crostons*, ib. 651, 663; above, p. 750.

(z) *Coles v. Holme*, 8 B. & C. 568; *Wilson v. Wilson*, 5 H. L.

also where the terms of some agreement embodied in a written instrument are upon the face of it ambiguously or inexactly expressed, the Court will not, as a rule, admit extrinsic evidence of what the parties' intention was, but will gather their intention from the written instrument alone, and decide, on consideration of the words used therein, what interpretation shall be given to them, or whether they bear any meaning at all (a).

Rectification
may be ob-
tained where
a written
instrument

Having thus adverted to the rule, to which rectification forms an exception, let us pass on to rectification itself. Courts of Equity have jurisdiction to rectify a

C. 40, 66, 67; Sug. V. & P. 171, note (1); *Re Daniel's Settlement*, 1 Ch. D. 375; *Greenwood v. Greenwood*, 5 Ch. D. 951; *Mourmand v. Le Chair*, 1903, 2 K. B. 216; *Re Dayrell*, 1904, 2 Ch. 496; *Re Alexander's Settlement*, 1910, 2 Ch. 225; Norton on Deeds, pp. 82 sq.

(a) *Altham's case*, 8 Rep. 150b, 155; *Croome v. Lediard*, 2 My. & K. 251; *Saunderson v. Piper*, 5 Bing. N. C. 425; Norton on Deeds, p. 98; see also *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 V. & B. 524; Sug. V. & P. 161; *Marshall v. Berridge*, 19 Ch. D. 233. This is hardly the place to state in full the rules, with their exceptions, as to the admission of extrinsic evidence in interpretation of written instruments. The reader is referred to Stephen on Evidence, Arts. 90—92; Norton on Deeds, Chaps. VI., VIII.; Wigram on Wills, L. Q. R. xx. 245. But it may be pointed out that, whilst extrinsic evidence of external facts, other than the fact of what the parties actually intended, is admissible to elucidate descriptions, apparently capable of being reduced to certainty by such evidence, of persons or things mentioned in the writing, evidence of the actual intention

of the parties is only admissible where it turns out, after attempting to elucidate a description of the above character by proof of such external facts, that the description is equally applicable to several objects. See above, p. 760; *Cheyney's case*, 5 Rep. 68; *Altham's case*, 8 Rep. 155; *Jones v. Newman*, 1 W. Bl. 60; *Miller v. Travers*, 8 Bing. 244, 248; *Doe d. Morgan v. Morgan*, 1 C. & M. 235; *Doe d. Gord v. Needs*, 2 M. & W. 129, 139, 140; *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363, 368, 369; *Re Hubbuck*, 1905, P. 129; Norton on Deeds, p. 104. We may also mention here that the rule in question does not prohibit the proof by oral evidence of some stipulation collateral and additional to a written contract and not inconsistent with the terms expressed in the writing; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Malpas v. London & South Western Ry. Co.*, L. R. 1 C. P. 336; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Lamare v. Dixon*, L. R. 6 H. L. 414; *Angell v. Duke*, L. R. 10 Q. B. 174; *De Lassalle v. Guildford*, 1901, 2 K. B. 215; *Frith v. Frith*, 1906, A. C. 254; *Re Taylor*, 1910, 1 K. B. 562, 572, 581.

written instrument purporting either to contain or to carry out an agreement between the parties thereto, if it be proved by clear evidence that the instrument as drawn does not embody or give effect to their real agreement (*b*). In order to make out a case for rectification, it must be shown that the parties have actually concluded an antecedent contract at variance in some respect with that expressed to be contained in or carried out by the written instrument, and that they intended to embody or give effect to that antecedent contract in or by the writing. In the first place, there must be an antecedent contract; no inconclusive negotiation or honourable understanding void at law is sufficient (*c*). Secondly, there must be a common intention of embodying or giving effect to that contract in or by the writing (*d*). That this is an essential condition of obtaining rectification appears from the fact that, if the parties agree to omit some term of their real contract from the written instrument, no rectification thereof can be obtained (*e*). It is likewise shown in the case of contracts required by the Statute of Frauds (*f*) to be put into writing. If the antecedent contract were one of these and there were a common intention to embody or give effect to all the terms of that contract in or by the writing, the writing may be rectified (*g*); and it is no defence to an action for rectification to plead that the

does not
express the
parties' real
agreement.

(*b*) *Urdale v. Halfpenny*, 2 P. W. 151; *Molteur v. London Assurance Co.*, 1 Atk. 545; *Henkle v. Royal Exchange Assurance Co.*, 1 Ves. sen. 317; *Baker v. Paine*, ib. 456; *Ball v. Storie*, 1 Sim. & Stu. 210; *Cowen v. Truefitt, Ltd.*, 1899, 2 Ch. 309; above, p. 644, n. (*k*).
(*c*) *Mackenzie v. Coulson*, L. R. 8 Eq. 368.
(*d*) See *Fowler v. Fowler*, 4 De G. & J. 250, 265.
(*e*) *Pitcairn v. Ogilbourne*, 2 Ves. sen. 375; *Arbuthnot v. Child*, 1 Bro.

C. C. 92; *Portmore v. Morris*, 2 Bro. C. C. 219; *Townshend v. Stangroom*, 6 Ves. 328, 332, 333; *Vauillon v. States*, 25 L. J. Ch. 875.

(*f*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*g*) *Mortimer v. Shortall*, 2 Dru. & War. 363, in which case a lease of land for life executed in pursuance of a parol agreement was rectified; *Cowen v. Truefitt, Ltd.*, 1899, 2 Ch. 309.

antecedent contract was one which the Statute of Frauds (*h*) requires to be in writing, and that it was made by word of mouth only (*i*). For if made by word of mouth, the contract was not void, but only not enforceable (*k*); and if the parties really assented to such a contract and had also a common intention of reducing or giving effect to all the terms of that contract to or by writing, and this intention were frustrated owing to the omission or mis-statement by mistake of some material term of the contract, it would be giving countenance to fraud to allow the defendant to repel proof of the mistake under cover of the statute (*l*). If, however, the writing purport to contain the contract, but omit some material part thereof, and there were no common intention to put the whole contract into writing, the document cannot be rectified. If this were not so, the Statute of Frauds could never be enforced. But, as we have seen (*m*), a person charged upon such a contract evidenced by a written memorandum is at liberty to plead in defence that the memorandum is insufficient to satisfy the statute by reason of its not containing the parties' whole agreement; and it does not appear that this defence can be met by a claim for rectification, unless it can be shown that there was a common intention of signing a perfect memorandum and that the omitted terms were left out by mutual mistake. Thirdly, the antecedent contract and the common intention of embodying it or carrying it out by the writing must be proved by very clear evi-

(*h*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*i*) *Thomas v. Davis*, 1 Dick. 301, 303; *Johnson v. Bragge*, 1901, 1 Ch. 28, 36, 37.

(*k*) Above, p. 11.

(*l*) See *Piteavin v. Ogbourne*, 2 Ves. sen. 375; *Pember v. Mathers*, 1 Bro. C. C. 52, 54; *Clarke v. Grant*, 14 Ves. 519, 524; *Fry, Sp. Perf.*

§§ 567, 814, 3rd ed.; above, p. 12. It is submitted that the *dictum* to the contrary of Alderson, B., in *A.-G. v. Sitwell*, 1 Y. & C. Ex. 559, 583, takes no account of the earlier authorities cited in this and the preceding notes and is not good law.

(*m*) Above, pp. 4, 8, 9.

dence; for, as we have seen (*n*), the rule is that, when several persons have joined in embodying some legal agreement or act in writing, they are bound by the intention expressed in the writing; and the whole burthen of proof lies on the person who asserts that the writing does not express the parties' real intention (*o*). For this reason the Court attaches great weight to the denial by the party, against whom rectification is claimed, of any intention at variance with that expressed in the writing: though it does not allow such denial to be a bar to the relief claimed, if overcome by clear evidence to the contrary (*p*). And for this reason also, where it is shown that the instrument sought to be rectified was executed in pursuance of and actually carries out at all points a prior agreement in writing, extremely strong evidence is required to induce the Court to believe that a mistake has occurred in drawing up the subsequent instrument. In such circumstances it is obvious that there could have been no mistake in the subsequent instrument unless the parties had come to a new agreement after they had made the agreement in writing, or had made a mistake in the

(*n*) Above, p. 781.

o *Henkle v. Royal Exchange Assurance Co.*, 1 Ves. sen. 317, 319; *Townshend v. Stangroom*, 6 Ves. 328, 333; *Fowler v. Fowler*, 4 De G. & J. 250, 261; *Tucker v. Bennett*, 38 Ch. D. 1, 9.

(*p*) *Pitcairn v. Ogbourne*, 2 Ves. sen. 375, 379; *Townshend v. Stangroom*, 6 Ves. 328, 334; *Bloomer v. Spittle*, L. R. 13 Eq. 422, stated below, p. 796. It is submitted that there is no rule, as suggested by the *dicta* of Lord St. Leonards in *Mortimer v. Shortall*, 2 Dr. & War. 363, 374, and Alderson, B., in *A.-G. v. Sitwell*, 1 Y. & C. 559, 583 accepted in Pollock on Contract, 513, 7th ed.), that if the alleged mistake be denied by one of the parties to the written instrument,

parol evidence alone is inadmissible to prove it. Such a rule would obviously be an inducement to fraud; and the weight of authority is against Lord St. Leonards' *dictum*. Parol evidence was admitted and prevailed in face of the defendant's denial in *Pitcairn v. Ogbourne*, 2 Ves. sen. 375, 379; *Garrard v. Frankel*, 30 Beav. 445; and *Paget v. Marshall*, 28 Ch. D. 255. And Baron Alderson's true meaning appears to have been that the Statute of Frauds prohibits the admission of parol evidence to prove a case for rectification in the face of the defendant's denial. But as we have seen, this proposition cannot be upheld; above, pp. 783, n. (*g*), 784, n. (*i*).

prior agreement in writing as well as in the instrument purporting to give effect to it. In the former case the plaintiff, who would scarcely be claiming rectification except to obtain the inclusion of some term in his own favour, is in this difficulty, that if the new term were gratuitously agreed to by the other party, there is for want of a consideration no *contract* between them to execute the subsequent instrument as alleged (*q*): though if there were a consideration for the new term, it appears on principle that he ought to be admitted to prove the contract so constituted. In the case of an alleged mistake, both in the antecedent agreement in writing and in the instrument giving effect to it, the plaintiff is in truth claiming the specific performance with a parol variation of the antecedent contract in writing; and in this case the authorities regarding his right to obtain relief are conflicting. These authorities it is now proposed to examine.

It has ever been held that one may claim rectification as plaintiff.

Now it has been clearly established from the earliest times of modern equitable jurisdiction that a man may well claim, as plaintiff, the rectification of a written instrument on the ground of a mistake common to all parties thereto in the terms of the writing, and may prove by extrinsic evidence that they entered into some antecedent contract at variance with the terms of the instrument and had a common intention of embodying or carrying out that contract in or by the writing (*r*). And it is, as we have seen (*s*), equally clear that the Statute of Frauds is no bar to obtaining such relief, notwithstanding that the antecedent contract were one of those required by that Act to be put into writing, but were made by word of mouth. It is also perfectly

(*q*) *Price v. Dyer*, 17 Ves. 356, 364; above, p. 783.

(*r*) Above, pp. 783, 784, and notes (*b*), (*g*), (*i*).

(*s*) Above, p. 783.

well settled that rectification will be granted in equity not only of written instruments in the nature of executed contracts, those which are meant to give effect to some antecedent agreement, but also of writings which are merely intended to embody an agreement of an executory nature (*t*). For example, a written contract to sell land may certainly be rectified just as well as a conveyance of land upon sale (*u*). Furthermore, it appears that under the old Chancery practice a claim for the rectification of a written instrument, which embodied an agreement of an executory nature, might well be joined with a claim for equitable relief in respect of the enforcement of the agreement (*x*). And under the rules of practice introduced by the Judicature Act of 1873 (*y*), the Supreme Court is required, in every cause pending before it, to grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause; so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. Now it would appear to be a necessary consequence of these rules that a man may first apply as plaintiff for the rectification of a written contract for the sale of land, and may afterwards sue for the specific performance of that contract, as rectified; and further, that he may well combine these claims in one action (*z*).

Rectification granted of instruments embodying executory as well as executed agreements.

Claim for rectification might be joined with claim for relief under the writing rectified.

t, *Henkle v. Royal Exchange Assurance Co.*, 1 Ves. sen. 317; *Baker v. Paine*, ib. 456; *Hodgkinson v. Wyatt*, 9 Beav. 566; *Stedman v. Collett*, 17 Beav. 608.

u, *Olley v. Fisher*, 34 Ch. D. 367, 369; see also *Fife v. Clayton*,

13 Ves. 546.

(*x*) See the last three cases cited in note (*t*), above.

(*y*) Stat. 36 & 37 Vict. c. 66, s. 24 (7).

(*z*) Fry, Sp. Perf. § 517, p. 227, 1st ed.; § 781, p. 346, 2nd ed.

On this point, however, the law is at present uncertain. The reason of this is as follows:—

Rule that specific performance of a written contract with a parol variation cannot be enforced by a plaintiff.

Rich v. Jackson;
Woollam v. Hearn.

Davies v. Fitton.

The defendant in specific performance may set up a parol variation.

It was decided before the commencement of the Judicature Acts, that a man is not entitled to enforce, as plaintiff, the specific performance of a written agreement with a parol variation. This decision was placed on the ground of the general principle above stated (*a*) that, if one seek to enforce a written contract, he is bound by the words used in the writing in which it is expressed, and extrinsic evidence is not admissible to show that the parties' real intention is different from that expressed in the writing (*b*). It is true that in the principal cases so deciding no express claim for rectification of the agreement appears to have been made: but as the bill was for the specific performance of a written agreement to grant a lease alleging a mistake in the amount of rent therein stated to be reserved and claiming to have a lease at the rent really agreed upon, it is obvious that rectification of the written agreement was incidentally or at least substantially claimed (*c*). Besides this, the same rule was applied by Lord St. Leonards in a case where rectification was claimed of a lease, which had been executed in strict accordance with an antecedent written agreement, on the ground of a common mistake in the lease and in the written agreement (*d*). A distinction was, however, taken with respect to the assertion of a parol variation of a written contract as a defence to proceedings for specific performance of the agreement (*e*). And it has been clearly

(*a*) Above, p. 781.

(*b*) *Rich v. Jackson*, 4 Bro. C. C. 514, 6 Ves. 324, n.; *Woollam v. Hearn*, 7 Ves. 211, 218, 219; *Davies v. Fitton*, 2 Dru. & War. 225, 232; see also *Squire v. Campbell*, 1 My. & Cr. 459, 480; *Manser v. Back*, 6 Hare, 443, 447; *Thompson v. Hickman*, 1907, 1

Ch. 550, 561.

(*c*) See *Rich v. Jackson*, 4 Bro. C. C. 514; *Woollam v. Hearn*, 7 Ves. 211.

(*d*) *Davies v. Fitton*, 2 Dru. & War. 225, 232.

(*e*) Above, p. 778 and n. (*d*). At law the defendant is bound by the writing and cannot allege any

established that a defendant to such proceedings may insist that the written contract does not contain the parties' real agreement, but that some stipulation made orally in his favour has by mistake or inadvertence been omitted from the writing, and that it would therefore be inequitable for the plaintiff to enforce against him the extraordinary remedy of specific performance, except on the terms of submitting to the parol variation. And the defendant may adduce extrinsic evidence in support of this contention (*f*). And the further distinction has been admitted, that if the parol variation be to one party's disadvantage, he may submit to it, even though he claim specific performance as plaintiff; for he is allowed to waive a right given to him by the written agreement, or to claim performance of that agreement as it stands, but with the addition of some extraneous act or promise which he offers to do or fulfil to his own detriment (*g*). But although the decisions were precise which refused specific performance at the plaintiff's suit of a written contract with a parol variation, there were not wanting expressions of judicial opinion that it was equally inequitable to deny at the defendant's instance the specific performance of a written agreement with the addition of some stipulation to his detriment, which had by a common mistake been left out, as to enforce the same remedy against him without a term so omitted and enuring to his advantage (*h*). As we have seen (*i*), the general principles established in equity with respect

parol variation; above, pp. 781 — 783; *Powell v. Edmunds*, 12 East, 6; *Ford v. Yates*, 2 Man. & Gr. 549.

(*f*) *Jaynes v. Statham*, 3 Atk. 388; *Rensbottom v. Gosdon*, 1 V. & B. 165; *Wineh v. Winchester*, ib. 375; *London and Birmingham Ry. Co. v. Winter*, Cr. & Ph. 57, 62; *Maner v. Back*, 6 Hare, 443; *Smith v. Wheatecroft*, 9 Ch. D. 223.

(*g*) *Martin v. Pycroft*, 2 De G. M. & G. 785; cf. *Preston v. Luck*, 27 Ch. D. 497.

(*h*) See *Walker v. Walker*, 2 Atk. 98, 100; *Jaynes v. Statham*, 3 Atk. 388, 389; *Pember v. Mathers*, 1 Bro. C. C. 52, 54; *Townshend v. Stangroom*, 6 Ves. 328, 339; *Fry, Sp. Perf.* 232 sq., 1st ed.; 350 sq., 2nd ed.

(*i*) Above, pp. 786, 787.

to the rectification of written instruments appear to lead us to a conclusion exactly opposed to the rule in question. This view prevailed with the great American jurists, Mr. Justice Story and Chancellor Kent (*k*). And the same opinion was maintained by Sir Edward Fry (*l*), who also suggested that, since the enactment of the above-mentioned provision of the Judicature Act (*m*), the rule was no longer applicable. This suggestion was followed by North, J., in *Olley v. Fisher* (*n*), who considered that the plaintiff's claims for rectification of an agreement to grant a lease and for specific performance of the agreement as rectified might well be enforced where (as in the case before him) the Statute of Frauds was not pleaded (*o*). An agreement to sell land of course stands exactly on the same footing (*p*). The rule against granting specific performance with a parol variation at the plaintiff's suit was, however, followed by Farwell, J., in *May v. Platt* (*q*): but in that case neither *Olley v. Fisher* nor Sir Edward Fry's opinion was cited. And more recently the decisions in *Davies v. Fitton* (*r*) and *May v. Platt* were followed by Neville, J., who considered that he was bound by them, but declared that he had great difficulty in following the reasoning on which they appear to be based, and pointed out that to refuse relief to a plaintiff claiming specific performance with rectification of a written agreement is exactly contrary to the principles of equity on which the entire doctrine of rectification is founded (*s*). In this case again, neither *Olley v. Fisher* nor Sir Edward Fry's opinion

Olley v.
Fisher.

May v. Platt.

Thompson v.
Hickman.

(*k*) 1 Story, Eq. Jur. § 161: *Gillespie v. Moon*, 2 John. Ch. N. Y. 585; *Keisselback v. Livingston*, 4 John. Ch. N. Y. 144.

(*l*) Specific Performance, pp. 227 sq., 1st ed.; 346 sq., 2nd ed.; §§ 811 sq., 3rd and 4th ed.

(*m*) Above, p. 787.

(*n*) 34 Ch. D. 367.

(*o*) See above, pp. 11, 12.

(*p*) Above, p. 764, n. (*l*).

(*q*) 1900, 1 Ch. 616; see below, p. 797.

(*r*) Above, p. 788.

(*s*) *Thompson v. Hickman*, 1907, 1 Ch. 550, 561, 562.

was cited. Having regard to these omissions and to Mr. Justice Neville's pronouncement on the point of principle, it is submitted that the decision in *Olley v. Fisher* is to be preferred; and further that, if that decision be right, there is no reason for not extending it to a case where the Statute of Frauds is pleaded. For as we have seen (*t*), it is settled that that statute can afford no defence to an action for rectification, if otherwise well founded.

Care must be taken to distinguish the cases in which a defendant to proceedings for specific performance effectually sets up a parol variation of the written agreement from those in which, though *pleading* the same defence, he *proves* no more than his own mistake and is really obliged to resist the plaintiff's claim on the ground of some misrepresentation or conduct contributing to his mistake, or of hardship (*u*). In the former case the defendant is really relying on a mistake common to both parties; he insists that their minds were in truth at one, but their real intention is not found in the writing. In the latter, his real defence is that the parties were not in truth agreed, though *at law* he is estopped from saying so, and he seeks to escape the application of the same rule of estoppel in equity also on the plea of misrepresentation or hardship (*x*). Hence it is that where a parol variation is pleaded as a defence to specific performance, the nature of the relief granted may vary according to the facts established by the evidence, and that it depends on the particular circumstances of each case whether the defence will merely defeat the plaintiff's claim, or whether the Court will order the performance of the contract according to the variation so set up (*y*). Thus if the alleged parol varia-

Distinction where a parol variation is proved, and where the defendant's own mistake is alone proved.

Where a parol variation is pleaded in defence, the relief may vary according to the facts proved.

(*t*) Above, pp. 783, 786.

(*u*) Above, pp. 776, 777.

(*x*) See above, pp. 776, 777.

(*y*) *London & Birmingham Ry. Co. v. Winter*, Cr. & Ph. 57, 62.

tion be plainly proved, so that the Court is satisfied that the agreement so varied was the parties' real agreement entered into with their true consent, it will not only reject the plaintiff's claim but will in the same action order, at the *defendant's* instance, the specific performance of the agreement as so varied (*z*). But as a rule the Court will not make an order in the same action upon the *plaintiff's* application for specific performance with the variation set up against him, unless he have by his pleading or (it seems) at the opening of the trial abandoned his claim to enforce the agreement as contained in the writing alone and submitted to perform it with the modification alleged. If the plaintiff maintain his own original contention to the end and fail to establish his claim, and the defendant do not ask for specific performance with the variation, then the Court will simply dismiss the plaintiff's action, but without prejudice, in general, to his suing for such specific performance in another action (*a*). It seems, however, that, if the defendant do not object, the Court may give the plaintiff the option of having his action dismissed or accepting an order for specific performance with the variation claimed (*b*). On the other hand, if the defendant do not establish by the extrinsic evidence admitted a true agreement between the parties as to some supplemental term omitted by mistake from the writing, but merely show that *he* was under a mistake in making the written contract, and that the plaintiff's conduct contributed to this mistake or that it would be a hardship on him (the defendant) to have to perform the written contract, the Court will in general leave the

(*z*) *Joppes v. Statham*, 3 Atk. 388; *Fife v. Clayton*, 13 Ves. 546.

(*a*) *Legal v. Miller*, 2 Ves. sen. 299; *Clowes v. Higginson*, 1 V. & B. 524, 534; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Smith v. Wheat-*

craft, 9 Ch. D. 223; *Marshall v. Berridge*, 19 Ch. D. 233; *Preston v. Luck*, 27 Ch. D. 497.

(*b*) See *Clarke v. Grant*, 14 Ves. 519; *Ramsbottom v. Gosdon*, 1 V. & B. 165.

plaintiff to his remedy at law, but may, it seems, give him the option of having his action dismissed or of having an order for specific performance of the contract as claimed to be varied by the defendant (*c*). And as we have seen (*d*), where the defendant has by mistake innocently made a misrepresentation to his own detriment in the written contract and fails to prove the plaintiff's real assent to a parol variation, the Court may give the plaintiff the option of rescinding the contract or of completing it according to the defendant's contention. If the defendant fail both to establish his claim, and to show any misleading conduct by the plaintiff or any hardship in his being obliged to perform the contract, the Court will order the specific performance of the written contract as prayed by the plaintiff (*e*).

It follows from the principles explained above (*f*) that, in order to obtain the rectification of a written instrument, a mistake common to all parties thereto must be proved. As we have seen (*g*), there must be an antecedent *contract*; this necessarily involves the true consent of all (*h*); and there must be a common intention of embodying that contract in or carrying it out by some writing (*i*). It follows that it is in general

To obtain rectification, there must be a *common* mistake.

(*c*) See *Higginson v. Claves*, 15 Ves. 516; *Gordon v. Hertford*, 2 Madd. 106; Fry, Sp. Perf. §§ 773 *sq.*, 3rd ed.; above, pp. 776, 777.

(*d*) Above, p. 726, and n. (*f*).

(*e*) Above, pp. 775, 776, and notes (*u*), (*x*).

(*f*) Pp. 783 *sq.*

(*g*) Above, pp. 783, 786.

(*h*) Above, p. 749.

(*i*) Here it may be noted that, if several persons agree generally upon some act in the law to be embodied in a written instrument

and one of them undertake to prepare the instrument on behalf of all, it is his duty to prepare what is in all respects a proper instrument, and if the instrument prepared fall short of this, but be executed by the others in the belief that it was an instrument proper to effect their intention, it may be rectified at their suit; *Corley v. Stafford*, 1 De G. & J. 228; *Clark v. Girdwood*, 7 Ch. D. 9; *Lovesy v. Smith*, 15 Ch. D. 655; cf. *Tucker v. Bennett*, 38 Ch. D. 1.

Cases where rectification with the alternative, at the defendant's option, of rescission, has been ordered on the ground of unilateral mistake.

Garrard v. Frankel.

a good defence to a claim for rectification to prove that the written instrument carries out the *real* intention of the defendant and the intention *manifested* (*k*) by the plaintiff; in other words, that unilateral mistake, the error of the plaintiff alone, is not sufficient ground for rectification (*l*). There are certain cases, however, in which an exception to this rule has been admitted. Thus in *Garrard v. Frankel* (*m*), the parties signed a memorandum endorsed upon a draft lease and expressing that the plaintiff would let, and the defendant would take, the premises within described at the rent of 230*l.*, and upon the terms of the within lease. It appears that at that time the amount of the rent was left in blank in the draft lease. Afterwards the plaintiff filled up the blank, inserting the figures 130*l.* by mistake; and the lease was thus engrossed and executed, without the plaintiff's observing his error. On discovering the mistake he sued for rectification. The defendant strenuously contended that the rent of 130*l.* was the rent really agreed upon. Romilly, M. R., however, entirely declined to credit the defendant's evidence on this point; he found in effect that at the time of signing the memorandum both parties really intended the rent to be 230*l.*, and that the defendant was aware of the discrepancy between the lease and the agreement. But he treated the memorandum as if it had been signed after the figures 130*l.* had been inserted in the draft, and held that the case was one where the document which constitutes the whole agreement contains in itself contradictory statements as to the amount of rent. And he further considered that the defendant executed the lease, not fraudulently, but in the innocent belief

(*k*) Above, p. 750.

(*l*) *Exeter v. Exeter*, 3 My. & Cr. 321; *Walsh v. Trevannion*, 16 Sim. 178; *Rooke v. Kensington*, 2 K. & J. 753, 763, 764; *Fowler v. Fowler*, 4 De G. & J. 250, 264,

265, 273; *Sells v. Sells*, 1 Dr. & Sm. 42; *Thompson v. Whitmore*, 1 J. & H. 268; *Bradford v. Romney*, 30 Beav. 431, 438; *May v. Platt*, 1900, 1 Ch. 616.

(*m*) 30 Beav. 445.

that the plaintiff was gratuitously granting her (*n*) a lease at about half the rent which he had asked! In this state of affairs the learned judge cut the knot by deciding that he could neither permit the defendant to derive any advantage from the mistake, nor oblige her to accept a lease different from that which she supposed she was executing. He therefore gave her the option of accepting the lease with the rectification claimed or having it set aside altogether. In *Harris v. Pepperell* (*o*), a memorandum was signed for the sale of "two houses in Teddington." The purchaser's solicitor inquired what property was comprised in the sale, and sent a plan showing what he supposed the defendant was buying. In reply, the vendor's solicitor sent a correct plan of what the vendor intended to convey: but the defendant's solicitor had the conveyance engrossed referring to a different plan, which comprised more, and sent the deed for execution without calling attention to the fact that he had not accepted the plaintiff's contention as to the parcels; and the vendor executed the conveyance without discovering the discrepancy. He afterwards sued for rectification of the conveyance. The defendant pleaded that *his* intention was carried out by the conveyance, and that the mistake of the plaintiff alone was no ground for rectification. Romilly, M. R., said that, as the Court will not enforce specific performance of a contract which one party has made under a mistake (*p*), so the Court may interfere where rectification is claimed on the ground of unilateral mistake, if the parties can be placed *in statu quo*; and on this ground he gave the defendant the option of accepting the rectification claimed or of annulling the contract. At

*Harris v.
Pepperell.*

n. The defendant was a lady.

(*o*) L. R. 5 Eq. 1.

p) It is submitted that this statement is far too wide, and in

the face of the decision in *Tamplin v. James*, 15 Ch. D. 215, cannot now be upheld; see above, pp. 775, 776, and *n*. (*x*).

*Bloomer v.
Spittle.*

the same time, he intimated pretty clearly that he thought that the defendant had behaved dishonestly. In *Bloomer v. Spittle* (q), the parties entered into an agreement in writing for sale of certain land, not excepting the mines thereunder, but the mines were excepted from the conveyance. Four years afterwards the purchaser sued for rectification on the ground of common mistake. The vendor by his answer denied the mistake, and alleged that the conveyance carried out the parties' real agreement. The vendor died before he could be cross-examined. Romilly, M. R., expressed the opinion that there had been a common mistake, and that the defence was not honest: but on account of the lapse of time since the execution of the conveyance, he gave the defendant's representatives the option of accepting the rectification claimed or of having the transaction set aside. In *Paget v. Marshall* (r), the plaintiff wrote to the defendant offering him the first and other upper floors of three houses, which offer the defendant accepted in writing; and a lease was executed accordingly. Afterwards the lessor sued for rectification on the ground that it was not intended that the first floors should be comprised in the lease. Upon the evidence given, Bacon, V.-C., expressed a strong inclination to the opinion that the defendant had clear notice from the negotiations which led up to the plaintiff's letter that he had no intention of letting the first floors. But the learned judge hesitated to pronounce that the defendant's conduct was actually fraudulent, and so he followed Lord Romilly's decisions, declaring that because of the plaintiff's mistake, the defendant

*Paget v.
Marshall.*

(q) L. R. 13 Eq. 427.
(r) 28 Ch. D. 255. This decision, as reported, was pronounced by Neville, J., to be wholly unintelligible; *Beale v Kyte*, 1907, 1 Ch. 564, 565, in which case the judge also pointed

out that the right rule is that, for the purpose of estimating any laches in applying for rectification, time begins to run from the date of the discovery of the mistake.

should be put to the election of accepting the rectification claimed or having the lease set aside (*s*).

These cases have met with adverse criticism. Thus the learned editors of *Dart on Vendors and Purchasers* remarked (*t*): "It is difficult to understand the ground of these decisions. Either there has been originally a contract, in which case the Court cannot make a new one, or there has been no contract, in which case neither at law nor in equity is there anything to enforce." And in *May v. Platt* (*u*), Farwell, J., expressed his concurrence in this comment, and delivered the further opinion that in the cases so criticised, the judges who decided them shrank from stigmatising the defendants' conduct as fraud, but treated it as equivalent to fraud, and that, in the absence of fraud, they would have had no jurisdiction to grant the relief they did. In *May v. Platt* (*x*), the defendant apparently agreed in writing to sell to the plaintiff certain leasehold land including by the defendant's mistake a plot which he had already parted with. A conveyance was executed in accordance with this agreement, the defendant assigning all the land described therein, including this plot, and entering into the statutory covenants for title. On discovery of the defendant's want of title, the plaintiff sued him for breach of these covenants. The defendant alleged common mistake and alternatively unilateral mistake and counter-claimed for rectification of the conveyance. His case was that the plaintiff had notice that he did not intend to sell the plot parted with. Farwell, J., gave judgment for the plaintiff both in his action and upon the counter-

Criticism of the above-mentioned cases.

May v. Platt.

(s) It is very significant that in this case the defendant accepted the rectification.

(t) 2 *Dart, V. & P.* 839, 6th ed. This criticism does not occur in

the 5th ed., vol. ii. 744; see vol. ii. p. 743, 5th ed.

(u) 1900, 1 Ch. 616, 618, 623.

(x) 1900, 1 Ch. 616.

claim ; he held that unilateral mistake was not sufficient to support a claim for rectification ; and he rejected the evidence that the plaintiff had notice of the intention not to sell the plot upon the ground that the defendant's counter-claim for rectification of a written instrument carrying out an antecedent contract in writing was equivalent to a claim made by a plaintiff for specific performance of that written contract with a parol variation, and that it was established by authority that such a claim could not prevail. As we have before pointed out (*y*), neither the criticism of Sir Edward Fry upon the rule so laid down, nor the case of *Olley v. Fisher* (*z*), was cited. And it is submitted that in this respect Mr. Justice Farwell's decision was wrong ; though he was right to refuse rectification for unilateral mistake (*a*).

Analysis of the circumstances in which rectification may be claimed.

Common mistake.

Plaintiff mistaken, but estopped at law.

Thus the decisions are conflicting, and the law is in a most unsatisfactory condition. And it does not appear that the dilemma put by the editors of Dart and crowned with Mr. Justice Farwell's approval, that there must either be an antecedent contract or not, is sufficient to remove all difficulties. It seems that the evidence offered in support of a claim for rectification of a written instrument may disclose the existence of any one of the following states of things :—(1) An antecedent contract founded on the parties' real assent and at variance with the terms of the written instrument. In this case it is plain that the plaintiff has established his title to relief. (2) An antecedent contract, which the plaintiff alleges that he made by mistake, but which bound him by estoppel at law (*b*), followed by an instrument containing or carrying out such contract,

(*y*) Above, p. 790.

(*z*) 34 Ch. D. 367.

(*a*) Above, p. 790.

(*b*) See above, p. 750.

the defendant contending that both the contract and the subsequent writing expressed his true intention. This was what occurred in the cases of *Paget v. Marshall* (c) and *May v. Platt* (d). Now the whole burthen of proof is on the plaintiff claiming rectification (e), and if in such circumstances he fail to prove that the contract and subsequent writing did not express the defendant's true intention, it is submitted that his claim for rectification ought to be rejected. He himself manifested an intention in accordance with that expressed and carried out. What equity then has he to be relieved against the writing binding him at law, if he cannot show that the defendant was equally in error? On the other hand, if the plaintiff can by extrinsic evidence prove a mistake common to both parties and occurring in the contract as well as the subsequent writing, it is questionable whether this evidence ought to be rejected. On principle, the better opinion seems to be that there is no objection to combining a claim for rectification of a written agreement with a claim for its specific performance (f). But on what ground can such an order as was made in *Paget v. Marshall* (g) be supported? If the Court gave any credence to the defendant's story, why should he have been put to the alternative of rectification or rescission? As to rectification, the plaintiff had not discharged the burthen of proof; and as to rescission, if the contract had not been completed, the plaintiff's mistake would have been no ground in equity for his obtaining the rescission of the contract (h), although it might have availed him, coupled with the plea of hardship, as a defence to specific performance (i). If on the other hand the Court believed in the truth of the plaintiff's

(c) 28 Ch. D. 255.

(d) 1900, 1 Ch. 616.

(e) Above, pp. 784, 785.

(f) Above, pp. 786—790.

(g) 28 Ch. D. 255.

(h) Above, p. 774.

(i) Above, p. 776.

Defendant
mistaken but
estopped at
law, and
subsequent
correction of
the error.

allegations, why should he have had to submit to the chance of the defendant's electing for rescission? If there were fraud on the part of the defendant, the election should, it is submitted, have been offered to the plaintiff either to treat the contract as void or to hold the defendant to its performance with rectification (*k*). The truth is that in *Paget v. Marshall* (*l*), as in the cases which the judge there professed to follow (*m*), the Court attempted to give an equitable judgment on the hypothesis that both stories were true, the plaintiff's allegation of fraud equally with the defendant's assertion of innocence. (3) There may be disclosed an antecedent contract, into which the defendant alleges that he entered by mistake, but which would estop him from proving the mistake at law (*n*), followed by a written instrument embodying or carrying out what the defendant alleges to have been his real intention and the parties' true agreement. This is the case of *Bloomer v. Spittle* (*o*). Here again it seems that the whole burthen of proof is on the plaintiff; it does not appear to be really shifted by his production of the antecedent contract; he is still bound to show that the subsequent instrument is not in accordance with the real intention of all parties; and if the defendant give evidence in reply showing *prima facie* that the parties abandoned the intention expressed in the antecedent contract as not being their real intention and determined to execute the subsequent instrument according to the terms therein contained, or even showing merely that the defendant entered into the antecedent contract by mistake and that the subsequent instrument expressed his own true intention and the plaintiff's manifested intention, then, it is submitted, the *onus*

(*k*) See above, p. 773; below, p. 802.

(*l*) 28 Ch. D. 255.

(*m*) Above, pp. 794—796.

(*n*) Above, pp. 750, 781.

(*o*) L. R. 13 Eq. 427; above, p. 796.

lies on the plaintiff of disproving this and showing that the true intention of all was that the subsequent instrument should accord with the antecedent contract (*p*). If he fail in this, he has not made good his claim to rectification; if he succeed, he has; and if the defence were dishonest, he ought to succeed. There seems to be no place for the alternative relief granted in *Bloomer v. Spittle* (*q*), except on the supposition that the plaintiff's claim was both adequately supported and insufficiently proved, and the defence at once dishonest and respectable. (4) There may be disclosed an apparent antecedent contract with regard to which there was no real assent of the parties and no estoppel from putting this in evidence. Such, it is submitted, were the cases of *Garrard v. Frankel* (*r*), as treated by Lord Romilly, and *Harris v. Pepperell* (*s*). If, as held by Lord Romilly, the memorandum of the antecedent agreement proved in *Garrard v. Frankel* were such that its statements as to the amount of the proposed rent were contradictory on the face of it (*t*), then the agreement was void for uncertainty; and in that case, if it were shown, as the Court found, that the lease executed carried out the defendant's intention and what she really and in good faith believed to be the plaintiff's intention, the plaintiff had failed to prove an antecedent agreement at variance with the terms of the lease, and his claim for rectification should have been rejected. Whilst if it were established that the defendant, knowing of the plaintiff's mistake as to the rent named in the lease, was minded wrongfully to take advantage of it, the option of rectification or rescission should have been given to him and not to her. In *Harris v. Pepperell*, it appears that the

No antecedent contract at all.

(*p*) See above, pp. 784—786.

(*q*) L. R. 13 Eq. 427.

(*r*) 30 Beav. 445; above, p. 794.

(*s*) L. R. 5 Eq. 1; above, p. 795.

(*t*) Above, p. 794.

Fraud.

antecedent agreement in writing to buy "two houses at Teddington" was either void for uncertainty (*u*) or contained such a latent ambiguity as allowed of the admission of parol evidence to explain the parties' real intention (*x*). In the latter case, if the parties' minds were not at one as to the property sold, the contract was equally void (*y*). Consequently, the plaintiff could not substantiate his claim for rectification without disproving the truth of the defendant's assertion that the conveyance was in accordance with his intention. If the judge believed the defendant, he ought to have given judgment in his favour. If he considered that the defendant was wrongfully seeking to take advantage of the plaintiff's mistake, the option of rectification or rescission should have been the plaintiff's. (5) It may be shown that the defendant knew of the plaintiff's mistake, and yet accepted his offer according to the literal terms thereof, well knowing that the plaintiff would believe him to be accepting the offer which the plaintiff supposed that he had made and not that which he *had* made. Such a state of mind would certainly be fraudulent; the defendant would have been wrongfully attempting to take advantage of the other's mistake. The cases above mentioned (*z*), especially *Garrard v. Frankel* (*a*) and *Paget v. Marshall* (*b*), may all serve for examples of this state of things, if we assume that the fraudulent intention so strongly suspected by the Court did in truth exist. If, however, the defendant's fraud be proved, it is submitted that the plaintiff has established his claim for rectification. The defendant's fraudulent acceptance of his offer left two courses open to him. He might treat the contract as

(*u*) Above, pp. 6, and n. (*t*),
795.

(*x*) Above, pp. 760, 782, n. (*u*).

(*y*) Above, p. 760.

(*z*) Above, pp. 794—796.

(*a*) 30 Beav. 445.

(*b*) 28 Ch. D. 255.

void for want of the parties' true consent; or he might hold the defendant to his acceptance of the offer according to the terms which he (the plaintiff) really intended to put, and which the defendant knew that he believed to be accepted (*e*). And by suing for rectification the plaintiff has elected to affirm the contract.

The right to obtain rectification of a written instrument is a mere equity (*d*) and not an equitable interest (*e*). It is like the right to set aside a conveyance induced by fraud (*f*). If therefore the legal or equitable estate or interest in any property be assured to any one by a conveyance liable to be rectified on account of a common mistake, the right to rectification cannot be asserted as against a purchaser taking from or through some party to the unrectified conveyance for value (*g*), in good faith and without notice of the mistake (*h*). But as in the case of fraud (*i*), this doctrine applies only to purchasers claiming under conveyances and does not, as a rule, extend to assignees of the benefit of a contract; although a contract for the sale of land, which has been executed by payment of the whole purchase money, appears to stand, as regards the passing of the equitable estate in the land sold, upon the footing of a conveyance.

Rectification of a conveyance cannot be had against a purchaser for value without notice.

As we have seen (*k*), upon the sale of land, rectification may be obtained of an error common to both parties either in the written contract prior to completion or in the conveyance. And it is no bar to an action for

On sale of land, rectification may be obtained either before or after conveyance.

(*c*) Above, pp. 773, 774.

(*d*) Above, pp. 781 *sq.*

(*e*) See *Phillips v. Phillips*, 4 De G. F. & J. 208, 218; *Cave v. Cave*, 15 Ch. D. 639, 647.

(*f*) Above, p. 757.

(*g*) See above, p. 757, n. (*e*).

(*h*) *Thomas v. Davis*, Dick. 301,

304; *Blackie v. Clark*, 15 Beav.

595; *Garrard v. Frankel*, 30 Beav.

445.

(*i*) Above, p. 758.

(*k*) Above, pp. 644, 650, 665, 786, 787.

rectification on this ground of a conveyance on sale that the contract has been completed (*l*). The case has no resemblance to that of a contract induced by an innocent misrepresentation but completed by actual conveyance according to the representation made (*n*). Thus, where by mutual mistake parcels have been omitted from the conveyance (*n*), or too much land has been conveyed by reference to a plan (*o*), or an easement intended to be granted has been incorrectly defined (*p*), or an exception or a reservation has been left out (*q*), or proper words of limitation have not been used (*r*), or the expressions importing the statutory covenants for title have not been put in or have not been restricted as they ought to have been (*s*), or any covenant not intended to be made has been inserted (*t*), the conveyance may be rectified; except to the prejudice of a purchaser for value claiming thereunder in good faith and without notice of the error (*u*). If in any of these cases the legal estate in any hereditaments failed, by reason of the error, to be assured as agreed, and an order of the Court for rectification of the conveyance be obtained, there is no need of any further express assurance of such legal estate; for it will pass by the effect of the order in the manner in which it is limited by the conveyance as so rectified (*x*).

(*l*) See *Beaumont v. Bramley*, T. & R. 41, 52; and cases cited above, pp. 644, n. (*k*), 787, nn.

(*t*), (*u*), and in notes (*u*), (*p*), (*q*), (*r*), below.

(*m*) Above, pp. 611, 653, 654, 730.

(*n*) *White v. White*, L. R. 15 Eq. 247.

(*o*) *Boale v. Kyle*, 1907, 1 Ch. 564.

(*p*) *Cowen v. Truitt*, Ld., 1899, 2 Ch. 309.

(*q*) *Exeter v. Exeter*, 3 My. & Cr. 321; *Mortimer v. Shortall*, 2

Dru. & War. 363; above, pp. 640, 641.

(*v*) *Re Bird's Trusts*, 3 Ch. D. 214; *Re Ethel and Mitchell and Butlers' Contract*, 1901, 1 Ch. 945, 948; *Re Tringham's Trusts*, 1904, 2 Ch. 487, 495; above, p. 650.

(*s*) See above, pp. 644, 665.

(*t*) *Rob v. Butterwick*, 2 Price, 190.

(*u*) Above, p. 803.

(*x*) *White v. White*, L. R. 15 Eq. 247; *Hanley v. Pearson*, 13 Ch. D. 545.

CHAPTER XIV.

OF FRAUD, MISREPRESENTATION, DURESS AND
UNDUE INFLUENCE.

§ 1. Of Fraud and Misrepresentation.

§ 2. Of Duress and Undue Influence.

§ 1.—Of Fraud and Misrepresentation.

LIKE other contracts, a contract for the sale of land may be avoided by either party, if he were induced to enter into it by fraud or misrepresentation, that is to say, by a false representation made to him by the other party, either fraudulently or innocently. A representation is a statement made by one party to a proposed contract to the other, before or at the time of entering into the contract, with regard to some fact relating thereto (*a*). But in order that a false representation may give rise to a right to avoid a contract, it must have induced the party, to whom it was addressed, to enter into the contract; that is to say, that he would not have given his assent to the contract at all, but for his belief that the statement was true (*b*). A statement of this kind may be made either outside the contract or within it (*c*). Thus the vendor of a house may state orally to a purchaser about to sign a contract to buy it

Contract voidable for fraud or misrepresentation.

Representation.

The representation must have induced the contract.

a *Behn v. Burness*, 3 B. & S. 751, 753.

b See *Flight v. Booth*, 1 Bing. N.C. 370, 377; *Attwood v. Small*, 6 Cl. & Fin. 232, 444; *Smith v.*

Kay, 7 H. L. C. 750, 775, 776; *Smith v. Land and House Property Corp.*, 28 Ch. D. 7.

c *Behn v. Burness*, 3 B. & S. 751, 753, 754.

that the drains are in good order or the cellars dry (*d*), or he may make the same statement in the particulars of sale; and in either case the representation may induce the purchaser's consent to the sale (*e*). The present law as to the effect of misrepresentation, fraudulent or innocent, in giving to the party misled the right to avoid the contract is a compound of the principles of common law and equity. It seems necessary, therefore, in order to arrive at a right understanding of the subject, to explain how false representations inducing a contract were treated in courts of common law and equity before their jurisdictions were united in the High Court of Justice.

Fraudulent
representation
at common
law.

At common law, if an untrue representation inducing a contract were made fraudulently, that is to say, either with the knowledge that it was untrue or in reckless ignorance whether it was true or false (*f*), the party so misled might at his election adopt one of two alternative courses. He might, where the parties could be restored to their former position, avoid the contract, not only pending its completion, but also after it had been completely performed (*g*), and sue for the recovery of any money paid or property conveyed thereunder, he on his part surrendering any benefit received thereby; or he might affirm the contract and bring an action of deceit to recover any damages caused by the fraudulent misstatement (*h*). And the common law allowed the like right of avoiding the contract, though not the same action of deceit, if a party to some contract of the class

Innocent mis-
representation
and even
non-disclosure

(*d*) Above, p. 769.

(*e*) See the cases cited at the end of note (*a*), p. 782, above, as to the admissibility of oral evidence in proof of a representation which has induced a written contract.

(*f*) *Behn v. Burgess*, 3 B. & S. 751, 753; *Derry v. Peek*, 14 App.

Cas. 337.

(*g*) See above, p. 654.

(*h*) *Deposit and General Life Assurance Co. v. Ayscough*, 6 E. & B. 761; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Clough v. London & North Western Ry. Co.*, L. R. 7 Ex. 26; *Benjamin on Sale*, 336, 342, 359, 2nd ed.

described as *aberrimæ fidei* (principally contracts of insurance) were induced to enter into it by a false representation made innocently or even by the non-disclosure of some material fact (*i*). But apart from fraud and except in the case of contracts *aberrimæ fidei*, a representation, at common law, could only affect a contract if it amounted to a warranty or promise of the truth of the fact stated and so formed a part of the whole agreement entered into (*k*): otherwise it had no effect at all (*l*). If it did form part of the contract, it might either be an essential term thereof, going to the whole substance of the contract—that is to say, it might be a stipulation, on the performance of which the performance of the rest of the contract was conditional; or it might be a term independent of the parties' main agreement—that is to say, a stipulation, on the performance of which the performance of the rest of the contract was not dependent. In other words, the representation might be either a condition or a pure warranty (*m*); and this question was determined by the parties' intention to be gathered from all the circumstances of the case (*n*). In the former case the untruth of the representation amounted to such a breach of contract by the party, who made the statement, as discharged the other from the performance of his part of the agreement (*n*). In the latter case, the party misled was not justified in repudiating the contract if the statement proved untrue; he was obliged to perform the main agreement: but he was entitled to damages for the breach of warranty

might avoid contracts *aberrimæ fidei*.

Effect of innocent misrepresentation at common law in the case of other contracts.

i, *Carter v. Boehm*, 3 Burr. 1905; *Morrison v. Universal Marine Insurance Co.*, L. R. 8 Ex. 197; *Ionides v. Pender*, L. R. 9 Q. B. 531; *London Assurance Co. v. Mansel*, 11 Ch. D. 363; *Rivaz v. Gerussi*, 6 Q. B. D. 222; above, p. 767.

(*k*) *Behn v. Burness*, 3 B. & S. 751, 753.

l, *Hopkins v. Tanqueray*, 15 C. B. 130; *Kennedy v. Panama, &c. Mail Co.*, L. R. 2 Q. B. 550.

m) Above, p. 763.

(*n*) *Flight v. Booth*, 1 Bing. N. C. 581; *Bannerman v. White*, 10 C. B. N. S. 844; *Behn v. Burness*, 3 B. & S. 751; and see *De Lasalle v. Grubbford*, 1901, 2 K. B. 215.

committed (*o*). And even in the former case, moreover, if the contract had been executed in favour of the party misled, so that he had received the consideration for his promise, he could not *then* refuse entirely to perform his part of the contract, unless the representation had amounted to a *special stipulation* that the contract should be void in case of its non-fulfilment (*p*); if not, he could only claim damages for breach of the warranty (*q*). It will thus be observed that in no case (apart from fraud and contracts *uberrimæ fidei*) was misrepresentation considered to affect the *formation* of the contract. The view was *not* taken that the parties only gave their consent, whereby they made a contract with each other, *conditionally* upon the representation being true; and that the contract was therefore avoided if it were untrue. On the contrary, the contract was treated as having been fully formed; the untruth of the representation occasioned a breach of the entire contract or a part of it; and even where it was held that the contract might be avoided after its execution in favour of the party misled, it was considered that this result was effected, not by an annulment of the parties' consent, but by their *express agreement* that the contract should be so avoided (*r*).

The common law treatment of misrepresentation was a particular instance of its rules respecting the dependence of mutual stipulations.

Here it may be pointed out that, as the common law took no account of a representation made innocently except as a *stipulation* forming part of the contract, its treatment of a representation as a condition or a warranty according to the parties' intention was no more than a particular instance of the rules of law respecting

(*o*) *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, adopted as law in the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, s. 53; see Benjamin on Sale, 448, 741, 748, 749, 2nd ed.; above, p. 32, n. (*b*).

(*p*) *Bannerman v. White*, 10 C. B. N. S. 844; *Behn v. Burness*, 3 B. & S. 751, 755, 756.

(*q*) *Street v. Blay*, 2 B. & Ad. 456.

(*r*) See last note but one.

the dependence or independence of mutual stipulations contained in a contract. At common law, if the obligation of one party to a contract be dependent on the fulfilment by the other either of his part of the contract or of some particular stipulation embodied therein, so that the *performance* of the latter party's duty under the contract or the particular stipulation is a condition precedent to his enforcing the obligation incumbent on the former, then a breach by the latter of his part of the contract or of the particular stipulation will discharge the former from his obligation under the agreement; and the former may, if he choose (*s*), rescind the contract and sue independently of the contract (under the old practice, in *assumpsit*) for the recovery of any money paid thereunder (*t*). But in order that the breach of some particular stipulation in a contract may discharge the party entitled to the benefit thereof from the performance of his part of the contract, the stipulation must go to the root of the whole consideration; its performance must be an essential condition of his incurring liability under the agreement (*u*). For example, we have seen that, upon a contract for the sale of land, the vendor's obligation to convey the land and the purchaser's obligation to pay the price are, as a rule, dependent on each other, and neither party can enforce the other's liability without performing or having offered to perform his own duty (*x*). So on a contract for the sale of land, the performance of the particular

¹⁸ He has the option of rescinding the contract, or affirming it and suing *under the contract* for damages for its breach; *Michael v. Hart*, 1902, 1 K. B. 482.

(*t*) *Flight v. Booth*, 1 Bing. N. C. 370.

(*u*) *Duke of St. Albans v. Shore*, 1 H. Bl. 270; *Campbell v. Jones*, 6 T. R. 570; *Bettoni v. Gye*, 1 Q. B. D. 183; *Mersey, &c. Co. v. Naylor*, 9 App. Cas. 434; *Corn-*

wall v. Henson, 1900, 2 Ch. 298, 303, 304; *Ellinger v. Mutual Life Insurance Co. of New York*, 1905, 1 K. B. 31; *General Bell Posting Co. v. Atkinson*, 1909, A. C. 118; see 1 Wms. Saund. 320, n. (4); 2 id. 352, n. (3); 2 Smith, L. C., notes to *Cutter v. Powell*.

(*x*) Above, pp. 578, 579; *Glazebrook v. Woodroave*, 8 T. R. 366. See *Pool v. Hill*, 6 M. & W. 835; *Laird v. Pim*, 7 M. & W. 474.

stipulation implied therein, that the vendor shall show a good title, is an essential condition of the purchaser's liability; and if this stipulation be broken, he may at once repudiate the contract and sue for the recovery of his deposit (*y*). Similarly, on an executory contract for the sale of goods with an undertaking that they shall be of a particular quality, compliance with this undertaking (*z*) is in general an essential condition of the sale, and the purchaser may, when the property has not yet passed to him under the contract, reject the goods on breach of the undertaking and altogether repudiate the agreement (*a*). But, although a man bound by a contract may refuse to perform his promise till the other party has complied with a condition precedent, yet, if he has received and accepted a substantial part of that which was to be performed in his favour, the condition precedent changes its character, and becomes a warranty in the strict sense of the word (*b*), that is, a collateral agreement independent of the rest of the contract; and non-compliance therewith will no longer afford a defence to an action to enforce his liability on the contract, but will only give rise to a counter-claim for damages (*c*). Thus where specific goods are sold with an undertaking that they shall be of a particular quality, the purchaser cannot return the goods after the property has passed to him, and he has so enjoyed the benefit of the contract: but if the goods be not of the

(*y*) Above, pp. 32, n. (*b*), 167, 168, 187, 190.

(*z*) Such an undertaking is of course commonly called a warranty of quality: but we avoid using the word "warranty" in the text on account of the strict sense in which the word is used in the Sale of Goods Act, 1893; see next note.

(*a*) *Street v. Blag*, 2 B. & Ad. 456, 463; *Heitbull v. Hickson*, L. R. 7 C. P. 438, 451; Benjamin

on Sale, 748, 2nd ed.; see stat. 56 & 57 Vict. c. 71, ss. 11, 62, and note that in the Act the term *warranty* is confined to cases where it is not a condition. Cf. above, pp. 32, n. (*b*), 763.

(*b*) Above, p. 763.

(*c*) Benjamin on Sale, 452, 2nd ed.; *Ellen v. Topp*, 6 Ex. 424, 441; *Behn v. Burgess*, 3 B. & S. 751, 755; and see *Bentzen v. Taylor*, 1893, 2 Q. B. 274.

quality promised, he is entitled to damages (*d*). In the same way, if one be induced to sign a contract for purchase of a house by the vendor's oral representation made untruly but not fraudulently that the drains are in good order, he may, if he discover the truth before completion, repudiate the contract at law and sue for the recovery of his deposit (*e*): but if he accept a conveyance before he become aware of the defect, he cannot then rescind the contract (*f*), though he may sue for damages for breach of the warranty implied in the representation (*g*).

Let us now turn to the principles of equity. Courts of Equity enjoyed a concurrent jurisdiction with the Courts of Law in the matter of fraud, but had a further exclusive jurisdiction to compel the delivery up and cancellation of written instruments, which had been forged or procured to be executed by fraud, duress or undue influence (*h*). As regards the avoidance of a contract induced by a fraudulent representation, the rule of equity was the same as the rule of law; the contract was regarded as, not void, but voidable (*i*) at the option of the party defrauded. He might therefore plead the fraud as an absolute bar to proceedings against him for specific performance of the contract (*k*). But, further, he might sue in equity as plaintiff, either before completion of the contract, to have the agreement rescinded and any written instrument containing it delivered up to be cancelled; or after completion, so long as the parties could be restored to their former

Equitable rules as to fraud or misrepresentation inducing contract.

Contract induced by fraud might be set aside in equity.

d) *Street v. Blum*, 2 B. & Ad. 456; *Benjamin on Sale*, 741, 744, 748, 753, 2nd ed.; stat. 56 & 57 Vict. c. 51, s. 11 (1 c.).

e) *Smith v. Land and House Property Corp.*, 28 Ch. D. 7.

f) Above, pp. 611, 653, 654.

g) *De Lassalle v. Guildford*, 1901, 2 K. B. 215.

h) *Wms. Real Prop.* 165, n. (c), 21st ed.; and cases cited below, p. 812, n. (l).

i) *Oakes v. Torquand*, L. R. 2 H. L. 325; *Re Duncan*, 1899, 1 Ch. 387, 389, 390.

k) *Charnaut v. Tashborough*, 1 J. & W. 112, 120.

position, to have the whole transaction set aside (*l*). Courts of Equity of course had no jurisdiction to entertain an action of damages for deceit (*m*): but they had jurisdiction to entertain a personal demand against any one, who had by a fraudulent representation induced another to act thereon to his detriment; they would in such case grant specific relief in the way of compelling the guilty party to make good his representation; and they might order him to recoup any definite pecuniary loss sustained by the party defrauded (*n*). A person induced by fraud to make a contract for the sale of land had therefore the like election in equity as he had at law; that is, he might either rescind the contract, or he might affirm it and claim to have the representation made good (*o*). But if he chose to affirm the contract and his loss by the representation were not capable of adjustment by some definite specific relief but could only be assessed at an uncertain sum of money, then he could only claim compensation in Courts of Equity pending the completion of the contract in proceedings brought either by or against him for its specific performance (*p*); for there was no original jurisdiction in equity to give damages except as ancillary to some specific relief. If in such case the defrauded party chose to complete the contract or did so before he detected the fraud, and still proposed to retain the benefit of the transaction and not to set it aside, he

(*l*) *Edwards v. McLeay*, G. Coop. 308, 2 Swanst. 289; *Attwood v. Small*, 6 Cl. & Fin. 232, 330, 331, 338, 395, 444 sq., 502; *Love v. Hicks*, 2 Y. & C. Ex. 46.

(*m*) *Ackwright v. Newbold*, 17 Ch. D. 301; *Smith v. Chadwick*, 9 App. Cas. 187, 193; *Derry v. Peck*, 14 App. Cas. 337, 360.

(*n*) *Erans v. Bicknell*, 6 Ves. 174, 183; *Burrows v. Lock*, 10 Ves. 470, 475; *Hill v. Lane*,

L. R. 11 Eq. 215; *Peck v. Gurney*, L. R. 6 H. L. 377, 390; *Low v. Bouceue*, 1891, 3 Ch. 82, 94, n., 107 sq.

(*o*) *Rawlins v. Wickham*, 3 De G. & J. 304, 314, 315, 321, 322.

(*p*) See above, pp. 724—726, as to the purchaser's right to specific performance with compensation. *A fortiori*, he has the like right where the representation was fraudulent.

could not then recover in equity any mere unliquidated pecuniary compensation for the false representation, but could only sue therefor as damages in an action of deceit at law (q).

With regard to innocent misrepresentation, it was early established in equity that if one were induced to enter into a contract by a false representation as to some material fact made honestly and not fraudulently, as by mistake or inadvertence, such misrepresentation was a good ground for resisting the specific performance of the contract. But it was at the same time asserted that a much greater degree of misrepresentation was necessary in order to justify the party misled in suing to rescind the contract (r); and it was long considered that to justify an order for rescission of the contract, even before its completion, the misrepresentation must be fraudulent, that is, made knowingly or recklessly (s). But this position was not maintained; and Courts of Equity afterwards held that, where one was induced to enter into a contract by a material misrepresentation, though made without fraud, the contract was voidable at his option, and he might sue to have it set aside and (if written) delivered up to be cancelled (t). It had, however, been decided, before the Courts of Equity had abandoned their former position with respect to rescis-

Innocent misrepresentation in equity.

No rescission for innocent misrepresentation after completion.

(q) *Newham v. May*, 13 Price, 749; *Lentz v. Hillas*, 2 De G. & J. 110; *Joliffe v. Baker*, 11 Q. B. D. 255, 267; *Clayton v. Leech*, 41 Ch. D. 103; Sug. V. & P. 235, 251; 2 Dart, V. & P. 904, 6th ed.; 812, 7th ed.

(r) *Cadman v. Horner*, 18 Ves. 10; *Savage v. Brocksopp*, ib. 335, 338; *Wilde v. Gibson*, 1 H. L. C. 605, 632, 633; *New Brunswick, &c. Co. v. Madderidge*, 1 Dr. & Sm. 363, 383; *Lamare v. Dixon*, L. R. 6 H. L. 414; above, p. 769.

(s) *Attwood v. Small*, 6 Cl. &

Fin. 232, 330, 338, 395, 444 sq., 502; *Lorell v. Hicks*, 2 Y. & C. Ex. 46, 51; *Barthett v. Salmon*, 6 De G. M. & G. 33; *Caythorne v. New Brunswick, &c. Co.*, 1 De G. F. & J. 578, 595; Sug. V. & P. 243, 244.

(t) *Pulford v. Richards*, 17 Beav. 87, 95, 96; *Stanton v. Tattersall*, 1 Sm. & G. 529; *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 61, 79, 80; *Torrance v. Bolton*, L. R. 8 Ch. 118.

sion for innocent misrepresentation, that a contract for the sale of land would not be set aside on this ground, where there had been no fraud, after it had been completed by conveyance and payment of the purchase money (*u*).

Difference in principle between the rules of common law and equity as to innocent misrepresentation.

The later rule so adopted in the Courts of Equity differed in principle from that applied in the Courts of Law; for the equitable rule treated innocent misrepresentation as a matter affecting the formation of a contract and invalidating the parties' consent in the manner accomplished at common law by fraud only with respect to ordinary contracts and without fraud in the case of contracts *uberrimæ fidei* alone (*x*). Practically, however, the difference was not great (*y*). To give rise to the right of rescission in equity, a false representation must have been a part of the transaction ending in the formation of the contract, and must have induced the consent of the party misled to the agreement (*z*). And in the same circumstances the representation would have been considered, at common law, to form part of the contract itself and to amount to a condition precedent to that party's liability under the contract; in which case he might, on breach of the condition, rescind the contract entirely (*a*). After the commencement of the Judicature Acts, the equitable rule in question became enforceable in all Divisions of the High Court of Justice; it has been followed and approved of by the highest authorities; and as a branch

The law since the Judicature Acts.

(*u*) *Wilde v. Gibson*, 1 H. L. C. 605, 632, 633. It should be noted that this decision, though professedly founded on the principle that a Court of Equity will not rescind a contract for misrepresentation unless made *knowingly* (that is, fraudulently), accords with the rule of the common law, which allowed no rescission

for innocent misrepresentation after the contract had been substantially performed; above, pp. 808, 810, 811; *Seddon v. North Eastern Salt Co.*, 1905, 1 Ch. 326.

(*x*) See above, pp. 806, 807.

(*y*) *Bowen, L. J., Newbigging v. Adam*, 34 Ch. D. 582, 592.

(*z*) See below, p. 821.

(*a*) Above, pp. 807, 809—811.

of the law of contract, it has prevailed over the rules of common law (*b*). Any contract therefore of whatever kind may now be rescinded by any party, who has been induced to enter into it by a material misrepresentation made to him without fraud by any other party thereto (*c*). And this right, if promptly asserted after the discovery of the untruth, will not be defeated by the fact that the contract has been partly performed (*d*), so long as the party misled has not received substantially the whole consideration due to him under the contract (*e*). But it has been held since the Judicature Acts, following the above-mentioned decision in equity to the same effect (*f*), that where a contract induced by misrepresentation, without fraud, has been entirely performed, so that the party misled has received the whole consideration due to him thereunder (as happens when a contract for the sale of land has been completed by conveyance and payment of the purchase money), he can no longer assert any right in equity to set the agreement aside (*g*). It has been decided, however, that in such case he may still sue at law for damages sustained by him in consequence of the false representation, if it amounted to a warranty (*h*). Otherwise he has no remedy, unless he can claim damages for a

(*b*) *Redgrave v. Hurd*, 20 Ch. D. 1, 12; *Smith v. Land and House Property Corp.*, 28 Ch. D. 7; *Newbigging v. Adam*, 34 Ch. D. 582; affirmed, nom. *Adam v. Newbigging*, 13 App. Cas. 368; *Derry v. Peck*, 14 App. Cas. 337, 347, 359; *Korberg's case*, 1892, 3 Ch. 1, 13; *Whittington v. Seabrooke*, 82 L. T. 49.

(*c*) Admitted and applied, *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, 96; *Wauton v. Coppard*, 1899, 1 Ch. 92; above, p. 726, n. (*f*).

(*d*) See last note but one.

(*e*) See above, pp. 808, 810, 811, 813, 814, n. (*u*).

(*f*) Above, p. 813.

(*g*) Selborne, C., *Brownlie v. Campbell*, 5 App. Cas. 925, 937, referring the case of *Hart v. Swaine*, 7 Ch. D. 42, to the ground of fraudulent misrepresentation; *Jolliffe v. Baker*, 11 Q. B. D. 255, 272; Cotton, L. J., *Soper v. Arnold*, 37 Ch. D. 96, 102; *Clayton v. Leech*, 41 Ch. D. 103; *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 1 Ch. 392, 416, 423; Farwell, J., *May v. Platt*, 1900, 1 Ch. 616, 623; *Debenham v. Sawbridge*, 1901, 2 Ch. 98; *Seddon v. North Eastern Salt Co.*, 1905, 1 Ch. 326; above, pp. 611, 653, 654.

(*h*) *De Lassalle v. Guildford*, 1901, 2 K. B. 215; above, p. 611.

To be fraudulent, a false representation must be made *knowingly* or *recklessly*.

No obligation to take pains to ascertain the truth.

What must be proved to give rise to the right to rescind a contract for misrepresentation.

1. Falsity essential.

2. There must be a representation.

breach of some covenant for title (*i*). It has further been finally established since the Judicature Acts that, in order to give rise to an action of deceit or any other proceedings (*k*) for a fraudulent misrepresentation, the representation must have been made either *knowingly* (without belief in its truth) or *recklessly* (without caring whether it was true or false); and that if a representation inducing a contract were made honestly in the belief that it was true, it is not sufficient to support an action of deceit that the party making the misstatement had no reasonable grounds for this belief. In other words, a man making such a statement is under no obligation to take reasonable pains to ascertain that it is true (*l*).

In order to give rise to a right to rescind a contract for misrepresentation, whether innocent or fraudulent, it appears that the following facts must be established:— There must have been a false representation made as to some material fact by one party to the contract, or his agent, to the other, as a part of the transaction ending in the formation of the contract; and the other must have entered into the contract on the faith of that representation, not knowing that it was false and reasonably believing it to be true (*m*). Let us make a further analysis of this statement. First, falsity is essential; there is no cause of action if the representation be true (*n*). Secondly, there must be a *representation*, that is, a statement of fact (*o*), either in words or by conduct

(*i*) See last note but one.

(*k*) Above, pp. 806, 811, 812.

(*l*) *Derry v. Peck*, 14 App. Cas. 337; *Angus v. Clifford*, 1891, 2 Ch. 449; *Le Lievre v. Gould*, 1893, 1 Q. B. 491; *United Shoe, &c. Co. v. Brunet*, 1909, A. C. 330, 338. This law has been altered with respect to statements made by directors or promoters of companies in prospectuses inviting

subscriptions for shares or debentures; stat. 53 & 54 Vict. c. 64.

(*m*) See Pollock on Contracts, 561 sq. 7th ed.; *United Shoe, &c. Co. v. Brunet*, 1909, A. C. 330, 338.

(*n*) See *Smith v. Chadwick*, 20 Ch. D. 27, 9 App. Cas. 187; *Bellairs v. Tucker*, 13 Q. B. D. 562.

(*o*) Above, p. 769.

(as in the case of active concealment of a defect) (*p*). As has been already shown, mere silence is not sufficient to confer the right to rescind (*q*); except in the case of contracts *uberrimæ fidei*, which may be avoided for non-disclosure of a material fact (*r*). And there must be a definite assertion of some fact as distinguished from a mere expression of the party's opinion or belief as to some circumstance relating to the contract, or a vague affirmation of the excellence of the property to be sold (*s*). For example, a distinct statement by a vendor of land that limestone embedded therein is capable of producing lime of first-rate quality fit for the London market (*t*), or that a house erected thereon is not damp (*u*), or that the property is let to a most desirable tenant (*x*), amounts to a representation sufficient, if false, to avoid the contract (*x*). But the incorrect description of renewable leaseholds as nearly equal to freehold (*y*) or of a small house as a desirable residence for a family of distinction (*z*) has been held not to amount to a representation affecting the contract (*a*). With regard to statements, which are ambiguous, being

Ambiguous statements.

(*p*) Above, p. 769.

(*q*) Above, pp. 765—767.

(*r*) Above, pp. 768, 807.

(*s*) *Fenton v. Browne*, 14 Ves. 144; *Trower v. Newcome*, 3 Mer. 701; *Scott v. Hanson*, 1 Sim. 13, 15; *Power v. Barham*, 4 A. & E. 473; *Benjamin on Sale*, 500, 2nd ed.; *Bellairs v. Tucker*, 13 Q. B. D. 562.

(*t*) *Higgins v. Samels*, 2 J. & H. 460. The actual decision was that the statement was a misrepresentation sufficient to bar the vendor from enforcing specific performance. The question whether the misrepresentation was sufficient to avoid the contract was not decided: though it was referred to as a difficult point. But at that time the equitable jurisdiction to rescind a contract for innocent misrepresentation

was barely established; see above, p. 813. There can be no doubt at the present time that such a misrepresentation would be sufficient to avoid the contract.

(*u*) *Strangways v. Bishop*, 29 L. T. O. S. 120.

(*x*) *Smith v. Land and House Property Corp.*, 28 Ch. D. 7; and see *Tibbatts v. Boulter*, 73 L. T. 534, where the representation was that certain licensed property was subject to mortgages for particular sums, and that the mortgagees were willing to allow these amounts to remain on the security; cases cited above, p. 769, *nn. g, h, i, k, l, m, n*.

(*y*) *Fenton v. Browne*, 14 Ves. 144.

(*z*) *Magennis v. Fallon*, 2 Moll. 561, 587.

(*a*) See also above, p. 770.

true if accepted in one sense, but false if taken in another, it must be shown, in order to found a right to rescission upon them, that the party, to whom they were made, understood them in the sense in which they were untrue (*b*). And it may be observed that a collateral promise to do some act, though it may effectively induce the promisee to enter into a contract (*c*), is not, properly speaking, a representation at all (*d*).
 3. The representation must be of some fact (*e*)

Promise not properly a representation.

Representation of intention, whether a representation of fact.

(*b*) *Smith v. Chadwick*, 9 App. Cas. 187.

(*c*) See cases cited at the end of note (*a*) to p. 782, above.

(*d*) *Expte. Barrell*, 1 Ch. D. 537, 552. See next note.

(*e*) It has been held that a representation made by a party to a proposed contract of his intention to do some act, but not amounting to a promise to do the act, may, if unfulfilled, be a ground for resisting the specific performance of the contract: *Myers v. Watson*, 1 Sim. N. S. 523; *S. C.*, nom. *Rose v. Watson*, 10 H. L. C. 671, 681, 682; *Lamare v. Dixon*, L. R. 6 H. L. 414, 428; or even for avoiding the contract; *Traill v. Baring*, 4 De G. J. & S. 318. These decisions appear inconsistent with the law laid down in *Jorden v. Money*, 5 H. L. C. 185; *Maddison v. Alderson*, 8 App. Cas. 467, 473; and they are criticised in Pollock on Contract, 525, 718—720, 7th ed.; see also Atkinson, L.A., *Cavalier v. Pope*, 1906, A. C. 428, 432. It certainly appears that in those cases it would have been more consistent with principle to treat the representation according to the common law doctrine as a collateral promise. And indeed it was stated by Lord Westbury in *Rose v. Watson*, 10 H. L. C. 681, 682, that the representation was regarded in equity as a substantial part of the contract. But it has been held that a false statement as to a man's intention may be a representation of fact, since it is a

representation as to the state of his mind, and may at least give rise to liability if made fraudulently. Thus it is considered that if a man contract to buy goods with the intention of not paying for them, that is a fraud sufficient to justify the avoidance of the contract on the vendor's part; *Load v. Green*, 15 M. & W. 216; *Crough v. London & North Western Ry. Co.*, L. R. 7 Ex. 26; *Expte. Whittaker*, L. R. 10 Ch. 446, 449; *Re Eastgate*, 1905, 1 K. B. 465. And it has been decided that a false statement made knowingly (that is, fraudulently) by the directors of a company inviting subscription to debentures, that it was intended to apply the money so borrowed to a particular purpose, was a statement of fact and a good cause of action of deceit against them; *Edgington v. Fitzmaurice*, 29 Ch. D. 459. As to a false statement of a person's motive in agreeing to buy or sell at a particular price, see *Vernon v. Keys*, 12 East, 632, 4 Taunt. 488, criticised in Benjamin on Sale, 356—358, 2nd ed., and Pollock on Contract, 563, 564, 7th ed.; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 243. Statement of belief that some event will happen in the future must of course be carefully distinguished from statement that some event has happened in the past; *Bellairs v. Tucker*, 13 Q. B. D. 562. By stat. 6 Edw. VII. c. 41, s. 20 (3, 5), an untrue representation as to a matter of

and not, it appears, of law (*f*). But for this purpose any representation as to a matter of private right is a representation of fact; such as a statement that one is the owner of some property which he offers for sale, or is invested with some power or authority under the particular constitution of some corporation or company or by virtue of some private Act of Parliament (*g*), or that the property is free from restrictive covenants (*h*). And it seems that misrepresentation as to some proposition of general law may give rise to a right of action, if made in deliberate fraud (*i*). Fourthly, the representation must be of some material fact, having relation to the proposed contract (*k*). But if the fact asserted relate to the contract and did actually induce the party, to whom the statement was made, to enter into the contract (*l*), it is a material fact (*m*); unless the circumstance alleged were such that no reasonable person would allow his judgment to be influenced by the statement (*n*). Fifthly, the represen-

sentation must be of some fact.

4. The fact must be material.

5. The representation

expectation or belief may avoid a contract of marine insurance. Such a contract is, however, *aberrant fidei*; see sects. 17—19; above, p. 807, and n. (*i*).

(*f*) *Lewis v. Jones*, 4 B. & C. 506, 512 (cf. above, p. 756); *Rashdall v. Ford*, L. R. 2 Eq. 750; *Beattie v. Ebury*, L. R. 7 Ch. 777, 800, 7 H. L. 102, 130; *Eaglesfield v. Londonderry*, 4 Ch. D. 693, 709; *Halbot v. Lens*, 1901, 1 Ch. 344, 350; *Harve v. Pearl*, &c. Co., 1904, 1 K. B. 558.

(*g*) Above, p. 654; *Cripps v. Read*, 6 T. R. 606, stated below, Chap. XIX. § 5; and see *Hume v. Paeck*, L. R. 1 Ch. 379, 385, where the contract was held to be for the purchase of such interest as the vendor had (see above, p. 202); *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Mostyn v. West Mostyn Coal and Iron Co., Ltd.*, 1 C. P. D. 145; *West London Commercial Bank v.*

Kitson, 13 Q. B. D. 360; and consider *Kettlewell v. Refuge Assurance Co.*, 1908, 1 K. B. 545, affirmed 1909, A. C. 243; cf. above, p. 780.

(*h*) Above, pp. 196, 197, 728, 729.

(*i*) *Hirschfield v. London, Brighton, &c. Ry. Co.*, 2 Q. B. D. 1, 5, 6; *Bowen, L. J.*, *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360, 362, 363.

(*k*) Above, pp. 816, 817.

(*l*) See above, p. 805.

(*m*) See *Smith v. Kay*, 7 H. L. C. 750, 759, 769, 770, 775; *Smith v. Land and House Property Corp.*, 28 Ch. D. 7; *Gordon v. Street*, 1899, 2 Q. B. 641, 646.

(*n*) See *Mogam v. Fallon*, 2 Moll. 561, 587; *Scott v. Hanson*, 1 Sim. 13, in which case however it is doubtful whether the law laid down was correctly applied to the particular facts. Under the present law of misrepresenta-

must be made by a party to the contract, or his agent.

False representation by agent.

tation must be made by some party to the contract or his agent; not by a third person (*o*). For the purposes of the rescission of the contract before completion, a false representation made by the party's authorised agent within the scope of his general authority has exactly the same effect as if it were made by the principal himself; it is immaterial whether the principal did or did not give any express authority for the statement to be made, and whether it was made fraudulently or innocently (*p*). And it is within the general authority of an agent employed to sell or to find a purchaser for any property to make statements as to its quality (*q*) or otherwise as to matters affecting its value (*r*). If, however, it be sought on the ground of misrepresentation to rescind a contract for the sale of land after completion, it appears that, as this relief is then only granted on account of a fraudulent misrepresentation (*s*), the plaintiff must establish a false representation made by the agent in such circumstances as to give rise to a good cause of action of deceit against the principal (*t*).

tion (above, pp. 814, 815) the decision would scarcely be the same.

(*o*) *Largan's case*, 1902, 1 Ch. 707.

(*p*) *Abinger, C. B., Cornfoot v. Fowke*, 6 M. & W. 358, 380 sq.; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. 145, 158; *Benjamin on Sale*, 371, 375, 2nd ed.; *Mul-*

lens v. Miller, 22 Ch. D. 194; *Smith v. Land and House Property Corp.*, 28 Ch. D. 7, 13; *Wanton v. Coppard*, 1899, 1 Ch. 92; *Cree v. Stone*, *Times Newspaper*, 10th May, 1907.

(*q*) See above, pp. 769, 817.

(*r*) See previous note.

(*s*) Above, p. 815.

(*t*) *Wilde v. Gibson*, 1 H. L. C. 605, 616, 617, 633, 634; *Brownlie v. Campbell*, 5 App. Cas. 925, 937, 938; see below, pp. 823, 824. It is submitted that the decision of Rolfe, Alderson, and Parke, BB., in *Cornfoot v. Fowke*, 6 M. & W. 358, is good law if confined to the point that, where it is necessary to prove a fraudulent misrepresentation as a ground for rescinding a contract, and the misrepresentation was in fact made innocently by an agent and not expressly authorised by the principal, conduct actually fraudulent on the part of the principal must be shown. In that case the defendant, wishing to take a short lease of a furnished house, asked an agent employed to let it for the plaintiff, if there were anything objectionable about the house. The agent answered, "Nothing whatever"; he honestly believed this to be true. The house was in fact next door to a brothel; but the agent did not know this. The plaintiff knew it, but had not expressly

Cornfoot v. Fowke.

Sixthly, in order to give rise to the right to rescind the contract, the representation must have been made as a part of the transaction ending in the formation of the contract. It must not have been a statement made independently of the negotiation preliminary to the contract (*u*). Seventhly, the representation must have actually induced the party misled to make the contract; it must have been an effective cause of his entering into the agreement (*x*). If he did not act in reliance on the statement made, but used his own judgment, there is no ground for rescinding the contract (*y*), or for maintaining an action of deceit where the misrepresentation

6. The representation must be a part of the transaction ending with the formation of the contract.

7. The representation must have induced the contract.

authorised the agent to make the statement. The defendant found out the untruth of the statement on the day after he had signed an agreement to take the house for two years, and immediately repudiated the agreement and declined to take possession. The plaintiff afterwards sued for the rent due under the agreement; and the defendant pleaded that he was induced to enter into the agreement by the fraud of the plaintiff and others in collusion with him. It was held, that to support this plea, it was not enough to show that the plaintiff's agent innocently made a false representation, which the plaintiff knew to be untrue, but did not expressly authorise: but the defendant must show that the plaintiff himself had acted fraudulently. Substantially, however, the facts there alleged appear to have been sufficient to give the defendant a right to relief under the common law as to innocent misrepresentation. That is to say that, if he had relied on the agent's representation as forming a part of the contract, he might have established the right to rescind it before it had been executed in his favour (and apparently it had not been so executed, since he had not taken possession; see *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145); or if the agreement had been so performed he might have recovered damages for breach of warranty that the representation was true; see 6 M. & W. 369, 372, 373; *National Exchange Co. v. Drew*, 2 Macq. 103, 108, 109, 145; Willes, J., *Borwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 262; above, pp. 807, 810, 811. Under the present law of rescission for innocent misrepresentation, it can scarcely be doubted that a party to a contract for the sale of land would be entitled, if misled in the same circumstances as the defendant in *Cornfoot v. Fowke*, to rescind the contract before completion: but if he were to claim rescission after completion, it appears that the decision in that case would still be in point. It is thought however that he might, after completion, recover damages for breach of the warranty implied by the representation: *De Lussac v. Girdleford*, 1901, 2 K. B. 215.

u) See *Hopkins v. Tinspector*, 15 C. B. 130; *Way v. Howen*, 13 C. B. N. S. 292; *Peck v. Gurney*, L. R. 6 H. L. 577; and cf. above, p. 814.

Above, p. 805, and n. *ib.*
y) *Jennings v. Broughton*, 17 Beav. 234, 238, 239, 5 De G. M. & G. 126, 138.

was fraudulent (z). So it has been held, in a case where active concealment of a defect was alleged as a fraud justifying the rescission of a contract, that a purchaser who had made no inspection of the defective article before buying it, *did not act upon* any implied representation of its soundness, and so could not avoid the agreement (a). But if any artifice were used to conceal a defect prior to the sale of land, it is thought that the vendor could not enforce the specific performance of the contract, although the purchaser had not inspected the property (b). Where a person has acted on the faith of a false representation made to him, it is no defence to any proceedings founded thereon that he might have found out the truth if he had made inquiry (c). Lastly, the party to whom the representation was made must not have known that it was false; he must reasonably have believed it to be true. We have seen that he has no cause of action if he were aware of the true facts of the case (d).

8. The party claiming to have been misled must not have known that the statement was false.

What is requisite to maintain an action of deceit for a false representation inducing a contract.

Motive, as a rule, immaterial.

To maintain an action of deceit for a false representation, which has induced one to enter into a contract, the same conditions are in general necessary as are required to confer the right to rescind the contract (e); and in addition to these, it must be shown that the false statement was made, either knowingly, that is, without belief in its truth, or recklessly, that is, without caring whether it were true or false (f). Where these conditions are fulfilled, it is not necessary to prove that

(z) *Smith v. Chadwick*, 9 App. Cas. 187, 195, 196; *Nash v. Calthorpe*, 1905, 2 Ch. 237.

(a) *Horsfall v. Thomas*, 1 H. & C. 90; see above, p. 769, n. (r), as to this case.

(b) See above, p. 770.

(c) *Dyer v. Hargrave*, 10 Ves. 505, 509, 510; *Dobell v. Stevens*, 3 B. & C. 623; *Reynell v. Sprye*,

1 De G. M. & G. 660, 710; *Price v. Macaulay*, 2 De G. M. & G. 339, 346; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 120; *Redgrave v. Hurd*, 20 Ch. D. 1.

(d) Above, p. 769.

(e) Above, pp. 816 sq.

(f) Above, pp. 806, 816.

the false statement was made with the actual intention of defrauding, cheating or wrongfully gaining some advantage over the party so deceived; for if the statement were made knowingly or recklessly, a fraudulent intention will be inferred (*g*). So also where an action of deceit is founded, not on a false statement in words, but on a fraudulent representation made by conduct (as in the case of active concealment of a defect (*h*)), it appears that an intention to defraud or cheat the party misled is of the gist of the action, but such intention may be inferred from the facts of the case (*i*). A principal is liable in an action of deceit for a false representation made by his agent, if it were untrue or reckless to the knowledge of the *principal* and were *expressly* authorised by him (*k*); or if it were untrue or reckless to the knowledge of the *agent* (though not of the principal) and were made either with the principal's express authority or without such authority within the scope of the agent's employment (*l*). But if the principal were aware of the untruth or recklessness of the statement, and the agent were not, and the representation were made by the agent, without fraud and in the honest belief that it was true, and without the *express* authority of the principal but within the scope of the

Principal, when liable in an action of deceit for a false representation made by his agent.

g) *Polhill v. Walter*, 3 B. & Ad. 114, 123; *Wilde v. Gibson*, 1 H. L. C. 605, 633; *Peck v. Garway*, L. R. 6 H. L. 377, 409; *Smith v. Chadwick*, 9 App. Cas. 187, 201; *Derry v. Peek*, 14 App. Cas. 337, 365, 371, 372, 374; *Le Lievre v. Gould*, 1893, 1 Q. B. 491, 498, 500.

h. Above, p. 769.

(i) *Selborne, C., Couks v. Boswell*, 11 App. Cas. 232, 236; see the cases cited below, p. 824, n. *o*), and cf. above, pp. 765–767.

(k) *Rolfe, Alderson, BB., Cornfoot v. Fowke*, 6 M. & W. 358, 370, 371.

(l) *Heen v. Nichols*, 1 Salk.

289; *Parke, B., Cornfoot v. Fowke*, 6 M. & W. 358, 373; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Swift v. Waterbotham*, L. R. 8 Q. B. 244; *Mockay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swice v. Francis*, 3 App. Cas. 106; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *George Whitechurch, Ltd. v. Cavanagh*, 1902, A. C. 117, 140; *Giblan v. National, &c. Union*, 1903, 2 K. B. 600; *S. Pearson & Son, Ltd. v. Dublin Corp.*, 1907, A. C. 351; see also *Kettlewell v. Refugee Assurance Co.*, 1908, 1 K. B. 545, 1909, A. C. 243.

agent's employment, it appears that, in order to charge the principal in an action of deceit (*m*), the party misled must prove some conduct positively fraudulent on the part of the principal; as for instance, that the principal, being aware of the agent's ignorance of the true state of the facts, purposely employed him to transact the business with the object of avoiding any discovery which would or might be made by inquiries put to the principal himself. Such conduct would, it is considered, amount to an active concealment (*n*) by the principal, for which he would be personally liable (*o*). But unless such fraudulent conduct on the part of the principal himself could be shown, it is thought that there would be no cause of action of deceit against him; for he could not be liable for his agent's tort, as the agent did no wrong; nor would the agent's statement amount to a tort committed by the principal himself, if the principal did not expressly authorise it to be made, and did not in any way wrongfully conceal the truth (*p*). The principal is not liable for a fraudulent representation by his agent which is not within the scope of the agent's general authority (*q*), or is made by the agent for his own personal advantage and not for the benefit of the principal (*r*). The agent is himself liable to the party misled in an action of deceit, if he made the false

Agent, where
liable.

(*m*) See above, p. 820, as to the right of the party misled to rescind a contract so induced.

(*n*) Above, p. 769.

(*o*) *Parke, B. Cornfoot v. Fowler*, 6 M. & W. 358, 362, 373, 374; above, p. 770, n. (*t*); *Ludgater v. Love*, 44 L. T. 694.

(*p*) It is submitted that this particular case is not covered by the remarks of Lords Loreburn and Halsbury in *S. Pearson & Son, Ltd. v. Dublin Corpn.*, 1907, A. C. 351, 354, 357—359, where the representation made was actually fraudulent on the part of the

agent, who made it.

(*q*) *Burnett v. South London Tramways Co.*, 18 Q. B. D. 815; *George Whitechurch, Ltd. v. Cavanagh*, 1902, A. C. 117.

(*r*) *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714; *Thorne v. Heard*, 1894, 1 Ch. 599, 1895, A. C. 495, 502; *George Whitechurch, Ltd. v. Cavanagh*, 1902, A. C. 117, 141; and see *Ruben v. Great Fingall Consol. Ltd.*, 1904, 2 K. B. 712, 725, 731, 1906, A. C. 439; and cf. *Hambro v. Burnand*, 1904, 2 K. B. 10.

representation knowingly or recklessly: but otherwise not (s). If both principal and agent honestly believed the statement to be true, neither is liable to an action of deceit (t). Of course an action of deceit for a false representation inducing one to enter into a contract may be brought, not only against a party to the contract or his agent, but also under similar conditions (u) against any other person, who has fraudulently (x) made a false statement with the intent that the party, to whom the statement was made, should act upon it or in a manner apparently calculated to induce him to act upon it (y).

Action of deceit may lie against one not a party to the contract.

It has already been pointed out (z) that contracts for the sale of land are not, as regards defects in the quality of the land itself or any building thereon, in the class of contracts *uberrimæ fidei*; the vendor is under no obligation to disclose any such defect, and if he merely keep silence regarding it, there is no ground for the purchaser to avoid the contract, or even, it is thought, to resist the specific performance thereof. The law is different, however, with respect to the suppression of a defect of title; as a man's title to land must necessarily lie within his own knowledge alone, and is not generally to be ascertained by independent investigation (a). Thus if a vendor of land suppress the fact that it is subject to restrictive covenants, or disclose some only of such covenants and keep silence as to the rest, that is equivalent to a representation that the land is free from

Contracts for sale of land are not voidable for non-disclosure.

Except in case of suppression of defects of title.

Suppression of the existence of restrictive covenants.

(s) *Swift v. Winterbottom*, L. R. 8 Q. B. 244, affirmed on this point. *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Derry v. Peek*, 14 App. Cas. 337.

(t) Parke, B., *Cornfoot v. Fowler*, 6 M. & W. 358, 373.

(u) Above, pp. 816 *sq.*, 822.

(x) Above, pp. 806, 816.

(y) *Pathill v. Walter*, 3 B. & Ad. 114; *Langridge v. Lepp*,

M. & W. 519, 4 M. & W. 337; see *Cann v. Wilson*, 39 Ch. D. 39, overruled on the ground that the representation there made was not fraudulent; *Le Lievre v. Gould*, 1893, 1 Q. B. 491, 498, 499, 501.

(z) Above, pp. 764—768.

(a) Above, pp. 768, 769 and n. 1 f.

such covenants or is only subject to those mentioned (*b*); and if this representation induced the purchaser to make the contract, he may rescind it (*c*). And where a vendor makes a special condition of sale in general terms sufficient to preclude objection to some defect of title, but omits to disclose the defect or to bring it to the purchaser's notice, the purchaser may nevertheless resist the specific performance of the contract in equity, though he may be unable to rescind it (*d*).

Misrepresentation as a defence to a claim for specific performance.

Any misrepresentation, whether fraudulent or innocent, which is sufficient to avoid a contract (*e*), is a good defence to proceedings against the party misled for the specific performance of the contract (*f*). But, further, the Court may refuse to enforce specific performance of a contract at suit of a party, who has innocently made a misrepresentation to the other, in cases where the party misled would have no right to rescind the contract (*g*). This is owing to the discretionary nature of the relief of ordering specific performance, and to the fact that, in granting or withholding this remedy, the Court may have regard to considerations of unfairness or hardship and as to the parties' conduct, which could have no weight at law (*h*). We have already quoted several instances of innocent misrepresentation affording a bar to specific performance but not conferring the right to rescind the contract (*h*). It appears that an innocent misrepresentation may be a good

(*b*) See above, pp. 41, 195, 728, 729.

(*c*) *Flight v. Booth*, 1 Bing. N. C. 370; *Phillips v. Caldwell*, L. R. 4 Q. B. 159; above, pp. 195, 351 and n. (*u*), 728.

(*d*) *Edwards v. Wickwar*, L. R. 1 Eq. 68; *Heywood v. Mallison*, 25 Ch. D. 357; *Nottingham Patent Brick and Tile Co. v. Butler*, 15 Q. B. D. 261, 16 Q. B. D. 778; *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Re Davis and Cavey*, 40

Ch. D. 601; above, pp. 38, 73, n. (*t*), 196—198, 204, 205; and see p. 211.

(*e*) Above, pp. 816 *sq.*

(*f*) Above, pp. 811, 813.

(*g*) *Lamare v. Dixon*, L. R. 6 H. L. 414, 428; *Re Banister, Broad v. Manton*, 12 Ch. D. 131, 142, 147, 149; above, pp. 199, 770.

(*h*) See the cases stated and cited above, pp. 37, 38, 196—199, 204—207, 768, 770, 776.

cause for resisting specific performance, although it may not have actually induced the party misled to make the agreement; that is to say, where it cannot reasonably be supposed that he would not have entered into the contract except in the faith that the representation was true (*i*).

Here we may mention a form of mis-statement in connexion with the sale of land, which has not exactly the true characteristics of a misrepresentation inducing the contract, but partakes of the same nature. That is where a man by mistake or inadvertence, or through fraud, sells some property, of which he is not entitled to dispose (*k*). In this case there will, in the ordinary course of things, be a breach of his obligation to show a good title. We have seen (*l*) that such a breach of the vendor's obligation under the contract will justify the purchaser in rescinding it: but in these circumstances the right of rescission is founded rather on the fact that the vendor cannot deliver the article contracted for, than on a false representation inducing the purchaser's consent (*m*). At the same time the vendor, by making the contract of sale, impliedly represents that he has the property described to dispose of; and it is on the ground of his estoppel by this representation that the Court allows the purchaser to claim specific performance with compensation, where the vendor has good right to a part, but not the whole, of the property sold (*n*). And if this implied representation were fraudulently made, the same consequences follow as if there had been a positive assertion in words of the

Sale by mistake or through fraud of land to which the vendor has no title.

(*i*) See previous note; and cf. above, pp. 805, 821.

(*k*) Above, pp. 724, 728, 730.

(*l*) Above, p. 810.

(*m*) See *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, where the contract was rescinded in a

Vendor and Purchaser summons, a proceeding in which there is no jurisdiction to rescind for misrepresentation *as such*; below, p. 828, n. (*n*).

(*n*) Above, p. 724.

vendor's ownership, and that representation had induced the other to enter into the contract (*o*).

Election to rescind or affirm a contract induced by misrepresentation.

Purchaser's right to specific performance with compensation.

Election to rescind must be made within a reasonable time.

Must be communicated.

As before mentioned (*p*), a person induced by misrepresentation, whether fraudulent or innocent, to enter into a contract for the sale of land, has the option of rescinding or affirming it: but the contract is voidable only, not void, and remains good until set aside (*q*). If the party so misled, being the purchaser, elect to affirm the agreement, he may, as a rule, enforce specific performance with compensation for the deficiency; and the limits of his right in this respect have been already explained (*r*). If the party misled propose to rescind the contract, his election to do so must be made within a reasonable time after the discovery of the misrepresentation; for long delay in claiming rescission after he has become aware of the true facts may be evidence of an intention to affirm the contract (*s*). And his election to rescind the contract must be communicated to the other party (*t*). If he elect to rescind the contract, he is entitled to take active proceedings under the equitable jurisdiction of the Court to have the agreement set aside and cancelled; he is not obliged to wait for this relief until he is sued thereon by the other party (*u*).

(*o*) Above, pp. 654, 819.

(*p*) Above, pp. 806, 812.

(*q*) *United Shoe, &c. Co. v. Brunet*, 1909, A. C. 330, 339.

(*r*) Above, pp. 724—732, 812.

(*s*) *Clough v. London and North Western Ry. Co.*, L. R. 7 Ex. 26, 34, 35; *Morrison v. Universal Marine Insurance Co.*, L. R. 8 Ex. 197, 203; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 239 *sq.*; *Erdinger v. New Sombbrero Phosphate Co.*, 3 App. Cas. 1218, 1277; *Re Duncan*, 1899, 1 Ch. 387, 390; *Seddon v. North Eastern Salt Co.*, 1905, 1 Ch. 326; *United Shoe, &c. Co. v. Brunet*, 1909, A. C. 330, 339; and see *Charter v. Tre-*

velyan, 11 Cl. & Fin. 714, 720; *Imperial Ottoman Bank v. Trustees, &c. Corp.*, 13 R. 287. If the party misled point out the misrepresentation, and the other make proposals for removing its effect, the right of rescission is only suspended and may be exercised, if the proposals fall through; *Tibbatts v. Boulter*, 73 L. T. 534.
(*t*) *Bulch-g-Turm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324; *Ashley's case*, L. R. 9 Eq. 263; and see *Re Duncan*, 1899, 1 Ch. 387, 390.

(*u*) Above, pp. 811, 813—815; *Hoare v. Bremridge*, L. R. 8 Ch. 22, 26; *London and Provincial Insurance*

Election to affirm the agreement may not only be expressly declared, but may be inferred from the acts of the party concerned (*x*), as by a purchaser's exercising acts of ownership in respect of the property bought (*y*). When the party misled, being aware of the misrepresentation made, has once elected to affirm the contract, he cannot afterwards rescind it (*z*). And where through the act of the person entitled otherwise to avoid the contract it has become impossible to restore the parties to their former position, the contract can no longer be rescinded (*a*); though a mere deterioration through use of some property purchased under a contract voidable for fraud will not prevent the rescission of the contract, if a payment in money would be an adequate compensation therefor (*b*). Thus if one induced to purchase mines by a fraudulent misrepresentation have entered into possession and worked out the mines, it appears that he cannot afterwards rescind the contract (*c*); but if in such circumstances mines or similar properties be only partially worked, so that their depreciation would be a proper subject for compensation, that will be no bar to a claim for rescission, though

Election may be evidenced by acts.

No rescission after an election to affirm the contract.

Nor where by the act of the party claiming to rescind *restitutio in integrum* has become impossible.

Co. v. Seymour, L. R. 17 Eq. 85. If sued, he may counter-claim for rescission: *Redgrave v. Hurd*, 20 Ch. D. 1; *Smith v. Land and House Property Corp.*, 28 Ch. D. 7. But a claim to rescind the contract for misrepresentation cannot be made in a vendor and purchaser summons: *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; see below, Chap. XIX. § 4.

Clough v. London and North Western Ry. Co., L. R. 7 Ex. 26, 37; *Law v. Law*, 1905, 1 Ch. 110, 158, 159.

g. People v. Briggs, L. R. 1 Eq. 183; *Scholen v. Central Ry. Co. of Venezuela*, L. R. 9 Eq. 266, n.; *Seddon v. North Eastern Salt Co.*, 1905, 1 Ch. 326; cf. above, pp. 190, 191.

(*z*) *Clough v. London and North Western Ry. Co.*, L. R. 7 Ex. 26, 34; *Law v. Law*, 1905, 1 Ch. 140, 158, 159; *United Shoe, &c. Co. v. Brant*, 1909, A. C. 330, 339.

a) Clarke v. Dickson, E. B. & E. 148; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. 145, 159, 165; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1278; *Romer, J., Ross v. De Benavente*, 1896, 2 Ch. 437, 446.

b) Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, 1278; *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392, 433, 456.

c) See Vignes v. Pils, 8 Cl. & Fin. 562, 650.

No rescission
as against a
purchaser for
value without
notice.

No rescission
for innocent
misrepresentation
after
completion.

in taking the accounts (*d*) the purchaser will be charged with a due allowance for the deterioration (*e*). These rules, however, apply only where the act of *the party claiming to rescind* has made complete restitution impossible. The defrauding party cannot resist rescission on the ground that *his* act has prevented the possibility of such restitution (*f*). Thus on a sale of mines voidable at the vendor's instance, he may set aside the sale, notwithstanding that the purchaser has worked them (*g*). As was pointed out in the previous chapter, the right to set aside a contract of sale or a conveyance of lands induced by fraud cannot be enforced, either at law or in equity, as against any person who has acquired the land sold, or any part thereof or interest therein, as a purchaser for valuable consideration in good faith and without notice of the fraud (*h*). *A fortiori*, the equity to set aside a contract for innocent misrepresentation would not be enforceable against any such purchaser. In the case of innocent misrepresentation, however, this point can hardly arise; since it is held that contracts for the sale of land induced by innocent misrepresentation cannot be set aside after completion (*i*); and the plea of purchase for value without notice cannot be set up by an assignee of the benefit of the contract, whilst it remains a mere chose in action (*k*). Subject to the limitations indicated in this paragraph, a contract to sell land may, if induced by fraud, be set aside after as well as before completion (*l*). And as we have seen, an action can be maintained, after completion, to recover damages at law for a false representation innocently made in connexion with the formation of a contract for the sale of

(*d*) See below, p. 836.

(*e*) Above, p. 829, n. (*b*).

(*f*) *Phosphate Sewage Co. v. Haytmont*, 5 Ch. D. 394, 448, 449, 452; *Rees v. De Bernardy*, 1896, 2 Ch. 437, 446.

(*g*) See *Gresley v. Mousley*, 4 De G. & J. 78.

(*h*) Above, p. 757.

(*i*) Above, pp. 813—815.

(*k*) Above, p. 758.

(*l*) Above, pp. 653, 654, 811, 812.

land, if the representation amounted to a warranty collateral to the contract, but otherwise not (*m*).

The right to rescind a contract for the sale of land on the ground of misrepresentation, fraudulent or innocent, is not personal to the contracting party; it may be exercised by his representatives after his death; and in the vendor's case, the right forms part of his real estate, and the benefit thereof will belong to his heir or devisee (*n*). So also the contracting party's assigns in his lifetime by operation of law, who take the benefit of the contract, as his trustee in bankruptcy (*o*), have the same election to avoid or confirm it as he had himself. The vendor's right to set aside after completion a contract for the sale of land induced by fraud appears to be so far an interest in the land that it is devisable by his will, and will pass under a general devise of all his real estate (*p*). It has been held, however, that an assignment by act *inter vivos* of a bare right of suit in equity to set aside a conveyance or a release for fraud is obnoxious to the laws of maintenance and champerty and is therefore void (*q*): but such an assignment may be made by a trustee in bankruptcy under the special provisions of the Bankruptcy laws (*r*). If either the vendor or the purchaser assign over the whole benefit of the contract pending completion (*s*) without being aware of some misrepresentation by the other party sufficient to avoid the contract, it appears that the assignee, for whom the assignor would be a trustee of

By what persons the right of rescission is exercisable.

Assignee of a voidable contract pending completion.

(*m*) Above, pp. 611, 810, 811.

(*n*) See *Trevelyan v. White*, 1 Beav. 588; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Stump v. Grady*, 2 De G. M. & G. 623, 630; *Gresley v. Mansley*, 4 De G. & J. 78, 93; above, pp. 527 *sq.*, 535.

(*o*) Above, pp. 546, 552. See also, p. 564.

(*p*) *Gresley v. Mansley*, 4 De G. & J. 78, 93.

(*q*) *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *D. Houghton v. Moorgate*, L. R. 2 Ch. 161, 169; *Hill v. Boyle*, L. R. 4 Eq. 260; *Fitzroy v. Cave*, 1905, 2 K. B. 364, 371.

(*r*) *Swan v. Lawson*, 15 Ch. D. 426; *Gray v. Churchill*, 40 Ch. D. 481; and see *Re Park Gate Wagon Works Co.*, 17 Ch. D. 234.

(*s*) Above, p. 568.

all his rights under the contract, would have the benefit of the option to rescind or affirm the contract, and of the right to specific performance with compensation. But if the assignor were aware of the misrepresentation when he assigned over the benefit of the contract, then it seems that the assignment, being the exercise of an act of ownership, would be evidence of an election to affirm the contract (*t*); and in such case it appears that the assignee could no more rescind the contract than the assignor himself (*u*). But the assignee would have the original contractor's right to claim compensation in proceedings either for specific performance or for breach of any warranty implied in the representation (*x*).

Against what persons the right of rescission is exercisable.

The right of rescission is exercisable, with the limitations above mentioned, against the other party's representatives after his death, his assigns for value or otherwise of the benefit of the contract so long as it remains a mere chose in action (*y*), and in the case of a purchaser, against his assigns, taking by operation of law (*z*) or by his own act, but either gratuitously (*a*) or on purchase *with* notice of the fraud (*b*), of the property purchased or any interest therein.

Action of deceit maintainable after death of party deceived.

An action of deceit for a false representation, whereby a man's personal estate has suffered damage, is maintainable under stat. 4 Edw. III. c. 7 (*c*), by his executors or administrators after his death (*d*). But an action to recover damages for deceit cannot, in general,

(*t*) Above, p. 829.

(*u*) Above, p. 829.

(*x*) Above, pp. 806—808, 810—813, 828; and see below, p. 833.

(*y*) Above, p. 758.

(*z*) *Lord v. Green*, 15 M. & W. 216, 221; *Re Eastgate*, 1905, 1 K. B. 465; *Tilley v. Bowman*, *Ld.*, 1910, 1 K. B. 745.

(*a*) *Bridgeman v. Green*, *Wilm.*

58, 64, 65.

(*b*) *Trevelyan v. White*, 1 Beav. 588; *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

(*c*) See *Wms. Pers. Prop.* 148, 16th ed.

(*d*) *Twyeross v. Grant*, 4 C. P. D. 40; and see *Hatchard v. Mige*, 18 Q. B. D. 771; *Oakey v. Dalton*, 35 Ch. D. 700.

be maintained after the death of the deceiving party (*c*). But not of deceiving party.
 If, however, the wrong were done within six calendar months before the wrongdoer's death (*f*), it is thought that an action would be maintainable therefor against his executors or administrators under stat. 3 & 4 Will. IV. c. 42, s. 2 (*g*). For as the personal representatives of the party deceived may sue for the wrong done, as being an injury to his personal estate (*h*), it appears that the cause of action must be a wrong done in respect of his property within the meaning of that statute (*i*). The direct assignment of a bare right of action of deceit appears to be obnoxious to the laws of maintenance and champerty and to be void on that account (*k*). But it may be contended that, where the whole benefit of a contract induced by fraud has been assigned over in good faith and for value, pending completion and before the discovery of the fraud (*l*), the assignee should be entitled, if he elect to affirm the contract, to succeed by subrogation to all the assignor's rights to compensation for the fraud; and should be enabled to sue the wrongdoer for damages at law in the assignor's name in the same manner as an insurer, who has paid compensation for damages caused by a

(*e*) *Peck v. Gurney*, L. R. 6 H. L. 377, 392; *Re Duncan*, 1899, 1 Ch. 387. It appears from the latter case that the suggestions to the contrary thrown out in *Twyeross v. Grand*, 4 C. P. D. 40, 42, 46, 47, were not well founded in law.

(*f*) See *Kirk v. Todd*, 21 Ch. D. 484.

(*g*) See *Wms. Pers. Prop.* 150, 16th ed. The action must be brought within six calendar months after the executors or administrators have taken upon themselves the administration of the deceased person's estate. See *Re Williams*, 52 L. T. 41.

(*h*) Note (*d*), p. 832, above.

(*i*) See also *Erskine v. Adeane*, L. R. 8 Ch. 756, 760; *Morgan v. Ravey*, 30 L. J. Ex. 131; *Jenks v. Clifden*, 1897, 1 Ch. 694.

(*k*) Above, p. 831; Co. Litt. 368b; Vin. Abr. Maintenance (B., C.); *Prosser v. Edmonds*, 1 Y. & C. 481; *De Hoghton v. Money*, L. R. 2 Ch. 164, 169; *Ball v. Warwick*, 50 L. J. C. P. D. 382; *James v. Kerr*, 40 Ch. D. 449; *Guy v. Churchill*, 40 Ch. D. 481, 485. The question, to what extent a right of action in tort is assignable, is discussed by the writer in L. Q. R. x. 147 sq., and *Wms. Pers. Prop.* 153—165, 16th ed.

(*l*) See above, pp. 831, 832.

wrong, may have the benefit of any action maintainable against the wrongdoer for the tort (*m*).

On what terms the contract will be rescinded before completion.

If a contract for the sale of land be lawfully rescinded, before completion, on the ground of misrepresentation, the party rescinding is entitled to be recouped all payments made and expenses incurred by him in the discharge of any obligation imposed on him by the contract, and to be indemnified against all liabilities assumed by him pursuant to any such obligation: but he is not entitled, where the misrepresentation was not fraudulent, to recover damages for what may be called his collateral losses—those which were not occasioned by or in the course of his discharge of some duty under the contract (*n*). Thus if the party rescinding be the purchaser, he is entitled to recover his deposit or any other instalment of his purchase money paid by him, with interest thereon at the rate of 4*l.* per cent. per annum, and to be recouped his expenses of the investigation of title (*o*); and he has a lien on the land sold for the amount so due to him until repayment (*p*). But if one be induced to buy land by a false representation innocently made that it is fit for the purposes of some particular business, and enter into possession pending completion, but pursuant to the contract, and

Purchaser's lien, where the contract is rescinded.

(*m*) See *Randal v. Cockran*, 1 Ves. sen. 98; *Mason v. Sainsbury*, 3 Doug. 61, 64; *Yates v. Whyte*, 4 Bing. N. C. 272, 283, 284; *Simpson v. Thomson*, 3 App. Cas. 279, 284—286, 290—295; *Castellain v. Preston*, 11 Q. B. D. 380, 388, 403, 404; *King v. Victoria Insurance Co.*, 1896, A. C. 250; Wms. Pers. Prop. 154, 155, 16th ed.; L. Q. R. x. 150, 151, 156, 157.

(*n*) *Redgrave v. Hurd*, 20 Ch. D. 1; *Newbigging v. Adam*, 34 Ch. D. 582, 589, 593—595, 596; *Adam v. Newbigging*, 13 App. Cas. 308, 324, 331; *Whittington v.*

Seale-Hayne, 82 L. T. 49, 51.

(*o*) *Smith v. Land and House Property Corp.*, 28 Ch. D. 7, 9; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, 97; *Cree v. Stone*, Times Newspaper, 10th May, 1907.

(*p*) *Wythes v. Lee*, 3 Drew. 396; *Rose v. Watson*, 10 H. L. C. 671, 682; *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101, 109, 110; *Mycock v. Beatson*, 13 Ch. D. 384; *Whitbread & Co. v. Watt*, 1901, 1 Ch. 911, 1902, 1 Ch. 835; *Ketton v. Hewett*, 1904, W. N. 21; and see *Ridout v. Fowler*, 1904, 1 Ch. 658.

carry on the business there at a loss, and then discover the untruth of the representation and rescind in consequence, he cannot recover compensation for his losses in the business (*q*). If the vendor of land rescind the contract, pending completion, because of misrepresentation, it is submitted that, on the principles above stated, he is entitled to be recouped his expenses of proving his title pursuant to the obligation in that behalf imposed upon him by the contract. But it seems questionable whether either party rescinding for innocent misrepresentation can recover his expenses of entering into the agreement; this loss seems to be in the nature of damage suffered by reason of the representation rather than outlay made in discharge of an obligation imposed by the contract (*r*). If, however, the representation were fraudulent, the defrauded party would be entitled to recover all damages attributable to the fraud, and he would certainly have the right to be re-imbursed these expenses (*s*); and it appears that, in the case of a defrauded purchaser, he should have a lien for them (*t*).

(*q*) *Whittington v. Seale-Hayne*, 82 L. T. 49. It is submitted that this case and those cited above, p. 815, n. (*b*), show that it is no bar to the right to rescind a contract for innocent misrepresentation that the purchaser has taken possession, pending completion, in pursuance of the contract; and that under the present law the case of *Blackburn v. Smith*, 2 Ex. 783, is no longer of authority on this point; and see above, pp. 190, 191. The mere occupation of land is not considered, in equity at least, to prevent *restitutio in integrum*: and even the commission of waste, as in working mines, may not have that effect; above, p. 829. Where a contract for the sale of land is rescinded for misrepresentation, innocent or

fraudulent, before completion but after the purchaser has taken possession under the contract, it is thought that the like accounts would be ordered to be taken, for the purpose of replacing the parties in their former position, as are directed when the contract is set aside for fraud after completion; see below, p. 836.

(*r*) As to the expenses recoverable as damages for breach of the contract, see below, Chap. XIX. § 2.

(*s*) *Edwards v. McLeay*, G. Coop. 308, 318, 2 Swanst. 287, 289; *Berry v. Armistead*, 2 Keen, 221, 229; *Hart v. Swaine*, 7 Ch. D. 42, 47.

(*t*) See *Mycock v. Beatson*, 13 Ch. D. 386; and the cases cited in the previous note.

On what terms the contract will be rescinded after completion.

If a contract for the sale of land be set aside, on the ground of fraud, after completion, the vendor rescinding is entitled, not only to be restored to the possession of the land, but also to recover the amount of the rents and profits thereof during the time when the purchaser was in possession; and the purchaser must account for all rents and profits, which he has received, and will be charged with an occupation rent for any part of the land which he has occupied himself (*u*). The vendor is also entitled to recover his expenses incurred in connexion with the sale (*v*), or with enforcing his right to set it aside, such as money paid to redeem some mortgage which the purchaser has made (*x*). On the other hand, the vendor must return the purchase money with interest at the rate of 4*l.* per cent. per annum (*y*). And the purchaser will be entitled to an allowance for all necessary outgoings and also, it seems, for substantial repairs and lasting improvements (*z*). Similarly, the purchaser so rescinding is entitled to be repaid the purchase money with interest at the same rate and his expenses incurred in connexion with the purchase (*v*), but must account for the rents and profits received by him and pay an occupation rent for any land in hand, and compensation for any deterioration caused by his use of the property, as in working mines (*a*); and he is entitled to the like allowance for necessary outgoings, substantial repairs and improvements (*y*). But it seems that, if an

(*u*) *Donovan v. Fricker*, Jac. 165; *Trevelyan v. White*, 1 Beav. 588; affirmed, *Charter v. Trevelyan*, 11 Cl. & Fin. 713; *Haygarth v. Wearing*, L. R. 12 Eq. 320, 330.

(*v*) *Edwards v. McLeay*, G. Coop. 308, 318, 2 Swanst. 287, 289; *Berry v. Armistead*, 2 Keen, 221, 229; *Hart v. Swaine*, 7 Ch. D. 42, 47.

(*x*) See *Tilley v. Bowman, Ltd.*, 1910, 1 K. B. 745, deciding that

money so paid by the vendor may be set off, in case of the purchaser's bankruptcy, against the vendor's obligation to return the price.

(*y*) See *Silkstone, &c. Co. v. Edey*, 1900, 1 Ch. 167, 171. £4 per cent. still appears to be the rate of interest chargeable; see also *Re Hunt*, 1902, 2 Ch. 318, n.; *Re Davy*, 1908, 1 Ch. 61.

(*z*) See notes (*u*), (*v*), above.

(*a*) Above, pp. 829, 830.

action be brought to set aside the conveyance, any claim to an allowance for substantial repairs and improvements ought to be specially made (*b*). If the amount chargeable against the purchaser for rents and profits exceed the interest on the purchase money, the accounts may be directed to be taken with annual rests, so that the excess of the profits above the interest may be applied in reduction of the principal (*c*): but a special case must be made out for taking the accounts in this way (*d*). The purchaser may in a proper case be directed to account for any rents and profits which he might, but for his wilful default, have received: but it appears that special circumstances must be shown in order to obtain this direction (*e*). A special case certainly seems necessary to charge the purchaser on the footing of wilful default, where he is the party defrauded (*f*). But where the fraud was his, he would, it is thought, be more readily charged on that footing (*g*). The purchaser is not chargeable with interest on the rents and profits for which he is accountable (*h*). But where the *vendor* is entitled to rescind (*i*), the purchaser is chargeable with any depreciation in the value of the land caused by

Whether purchaser chargeable on the footing of wilful default.

(*b*) *Edwards v. McLeay*, G. Coop. 308, 318, 2 Swanst. 287, 289; see also *Baugh v. Price*, 1 Wils. K. B. 320, 322; *Hoggarth v. Wearing*, L. R. 12 Eq. 320, 330.

(*c*) *Donovan v. Fricker*, Jac. 165.

(*d*) *Neesom v. Clarkson*, 4 Hare, 97, 105.

(*e*) See the cases cited p. 836, nn. (*u*), (*v*), above; *Howell v. Howell*, 2 My. & Cr. 478, 486; *Murray v. Palmer*, 2 Sch. & Lef. 474, 489, where however the decree made does not accord with the judgment; *Gibson v. D'Este*, 2 Y. & C. C. C. 542, 581; reversed, *Wilde v. Gibson*, 1 H. L. C. 605, 636; *Frees v. Coke*, L. R. 6 Ch. 645, 651; above, p. 515.

(*f*) Such an account was directed as against a purchaser held entitled to rescind in *Gibson v. D'Este*, 2 Y. & C. C. C. 542, 581, reversed as mentioned above, n.

(*g*) But it is submitted that this was clearly wrong; see *Howell v. Howell*, 2 My. & Cr. 478, 486.

(*h*) See *Howell v. Howell*, 2 My. & Cr. 478, 486; *Adams v. Sworder*, 2 De G. J. & S. 44, 61; *Tate v. Williamson*, L. R. 2 Ch. 55; *Seton on Judgments*, 2320, 6th ed.; *Silkstone, &c. Co. v. Edey*, 1900, 1 Ch. 167.

(*i*) See cases cited above, p. 836, nn. (*u*), (*v*); *Silkstone, &c. Co. v. Edey*, 1900, 1 Ch. 167.

(*j*) See above, p. 830.

any act of waste or deterioration, which he has committed (*k*). And, as we have seen (*l*), the purchaser rescinding may have to make a similar allowance.

Forged documents.

In connexion with the subject of fraud, it may be mentioned that a forged document, whether it be a deed or a simple writing, is, as a rule, an absolute nullity (*m*). If it be a conveyance, no interest passes thereby (*n*); if it be a power of attorney, it confers no authority (*o*); and if it take the form of a contract, it imposes no liability on any party whose seal or signature thereto is forged (*p*). And if it assume the shape of a negotiable instrument, it acquires no validity in the hands of a purchaser for value in good faith and without notice of the forgery (*q*). A forgery, being an illegal act, cannot, strictly speaking, be ratified by the person whose seal or signature is counterfeited (*r*). But the seal or signature, or the forged document, may be adopted by him as his own and may acquire validity as against him under the doctrine of estoppel by conduct (*s*). Thus if one admit or represent a forged document to have been signed or sealed by him, he will be liable thereunder to any person who has altered his position on

Adoption of a forged instrument.

(*k*) See *Expte. Bennett*, 10 Ves. 381, 400, 401; *Robinson v. Ridley*, 6 Madd. 2; *Gresley v. Mousley*, 4 De G. & J. 78.

(*l*) Above, p. 830.

(*m*) *Johnson v. Waddle*, 3 Bing. N. C. 225; *Roberts v. Tucker*, 16 Q. B. 560; *Brocklesby v. Temperance Bdg. Soc.*, 1893, 3 Ch. 130, 135, 137, 1895, A. C. 173, 184; *Ruben v. Great Fingall Consol., Ltd.*, 1904, 2 K. B. 712, 1906, A. C. 439.

(*n*) *Boursot v. Savage*, L. R. 2 Eq. 134; *Re Cooper*, 20 Ch. D. 611; *Barton v. North Staffs. Ry. Co.*, 38 Ch. D. 458; *Jared v. Clements*, 1903, 1 Ch. 428.

(*o*) *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. C.

389; *Corp. of Staple v. Bank of England*, 21 Q. B. D. 160; *Olivier v. Bank of England*, 1901, 1 Ch. 652, 654; affirmed, 1902, 1 Ch. 610, and nom. *Starkey v. Bank of England*, 1903, A. C. 114.

(*p*) See note (*m*), above, and next note.

(*q*) *Esdaile v. La Nauze*, 1 Y. & C. Ex. 394; *Fearn v. Filica*, 7 Man. & Gr. 513; *Burchfield v. Moore*, 3 E. & B. 683; *Bobbett v. Pinkett*, 1 Ex. D. 368, 374; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Capital and Counties Bank v. Gordon*, 1903, A. C. 240.

(*r*) *Brook v. Hook*, L. R. 6 Ex. 89.

(*s*) Above, p. 750.

the faith of this representation (*t*). So if one endorse a forged bill of exchange, he will be liable thereon to a holder in due course (*u*). Money paid on the faith that a forged document is genuine is paid under a mistake of fact and may in general be recovered back (*x*): but if the amount payable under a forged bill of exchange or promissory note be paid by a person liable thereon to a *bonâ fide* holder in the belief that it was genuine, the sum paid cannot be recovered from him, unless notice of the forgery be given to him at once before he has altered his position in consequence of the payment, and at latest on the same day (*y*). If an agent innocently make use of a forged authority from his principal or supposed principal, he is liable under the doctrine of implied warranty of authority to make good any damage suffered by any person whom he has induced to act on the faith of the authority being genuine (*z*).

Recovery of money paid on the faith of a forged document.

Liability of agent procuring a forged authority.

§ 2.—Of Duress and Undue Influence.

We have seen (*a*) that, in order to make a valid contract, there must be *free* consent of the parties. Contracts induced by duress or undue influence are

Contracts induced by duress or undue influence are voidable.

t *Leach v. Buchanan*, 4 Esp. 226; *Ashepote v. Bryan*, 3 B. & S. 174, 492, 493; *M'Kenzie v. British Lamin Co.*, 6 App. Cas. 82, 99—101, 109; and see *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 581; *Stann v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188; *Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. D. 103; *Sheffield Corp. v. Barclay*, 1903, 2 K. B. 580; *Ruben v. Great Fingall Consol., Ltd.*, 1904, 2 K. B. 712, 1906, A. C. 439.

u *Bank of England v. Pagano*, 1891, A. C. 107, 116.

x *Jones v. Ryde*, 5 Taunt. 488; *Wilkinson v. Johnston*, 3 B. & C. 428, 434; *Gurney v. Womersley*, 4 E. & B. 133. As to the re-

covery of money paid under a mistake of fact, see *Kelly v. Solari*, 9 M. & W. 54; *Re Biologa Co., Ltd.*, 1904, 1 Ch. 276; *Baker v. Courage*, 1910, 1 K. B. 56; and as to the recovery from an agent of money so paid to him, see *Pallard v. Bank of England*, L. R. 6 Q. B. 623, 630; *Taylor v. Metropolitan Ry.*, 1906, 2 K. B. 55, 63.

y *Cocks v. Masterman*, 9 B. & C. 902; *London and River Plate Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7.

z *Starkley v. Bank of England*, 1903, A. C. 114; *Bank of England v. Cutler*, 1908, 2 K. B. 208.

(*a*) Above, p. 2.

wanting in this element of validity: but in such contracts, as in the case of agreements induced by fraud, there is not the entire absence of consent which is characteristic of mistake (*b*). The party coerced or unduly influenced does really consent to the proposed agreement; only he would not have done so had he been a free agent (*c*). Contracts induced by duress or undue influence are therefore not void: but they are voidable at the option of the party whose consent was so procured (*d*). The common law did not go beyond avoiding contracts induced by duress, that is, actual force or threats of violence. And it is laid down that the duress must be of the person and not of property (as by wrongfully taking or withholding goods, or threatening to do so); and that if actual force were not used, there must be the fear of losing life or limb, or of unlawful imprisonment. Thus battery was duress, but not the mere threat of battery (*e*). And the duress must have been used to the party to the contract himself or to his wife, child or parent (*f*). In equity, however, a far wider jurisdiction was assumed to set aside contracts made without free consent; and it was adjudged to be sufficient to avoid a contract or a conveyance if there were such constraint of the will of the party making it that his consent (*g*) thereto were not

Duress at
common law.

Equitable
doctrine of
undue
influence.

(*b*) Above, pp. 748, 757.

(*c*) Cf. above, p. 757.

(*d*) Bract. fo. 100b (§ 13), 396b (§ 3); 2 Inst. 482; *Whelpdale's case*, 5 Rep. 119, and cases cited below. It may be noted that, in the case of the marriage contract, which is peculiar and of which the initial validity or invalidity depends partly on considerations foreign to the common law, a consent induced by fraud, force or fear, may be treated as being no consent at all; see *Fulwood's case*, Cro. Car. 488, 493; *Harford v. Morris*, 2 Hagg. Cons. 423,

425, 436; *Field's Marriage*, 2 H. L. C. 48, 58—62; *Scott v. Sobright*, 12 P. D. 21; *Cooper v. Crane*, 1891, P. 369, 376; *Ford v. Stier*, 1896, P. 1; 1 Black. Comm. 433—436; Bishop on Marriage and Divorce (Chicago, 1891), vol. i. § 548; *Moss v. Moss*, 1897, P. 263, 271 sq.

(*e*) 2 Inst. 483; Bac. Abr. Duress (A); 1 Black. Comm. 130, 131, 136; *Skeate v. Beale*, 11 A. & E. 983, 990.

(*f*) Bac. Abr. Duress (B).

(*g*) See above, p. 749 and n. (*e*).

free, although the constraint did not amount to duress at common law (*h*). And this doctrine of equity is by no means confined to the inducement of consent by outward force or fear; it extends to every case in which such influence is exerted by one party to a contract or conveyance over the mind of another that the other does not in fact consent thereto of his own free will (*i*). The question to be determined in each case is whether the party, who alleges that he was unduly influenced, agreed to the contract or conveyance made as a free agent exercising his own untrammelled volition; and if he did not, he may avoid the transaction (*j*).

The cases, in which a contract or conveyance may be avoided for undue influence, are usually divided into two classes. The first is where the alleged ground of avoidance simply is that the one party did in fact actively exercise such influence over the other's mind that he was not a free agent, and it is not asserted that the one stood in any confidential relation to the other (*k*). The second is where it is claimed that *undue* influence should be implied from the fact that there was a confidential relation between the parties, which invested the one with a peculiar authority over the other, or imposed on him a special duty of advising the other (*l*). In both classes the question to be determined is the same; was such influence exerted as to interfere with the freedom of the other's will? But they differ with

Two classes of cases of undue influence.

1. Where exercised independently of any special relation between the parties.

2. Where implied from the existence of some confidential relation.

(*h*) *A.-G. v. Sothern*, 2 Vern. 497; *Huguenon v. Boscley*, 14 Ves. 273, 294; *Peel v. —*, 16 Ves. 157, 159; and see *Chesterfield v. Janssen*, 2 Ves. sen. 125, 155–157, where this jurisdiction is alluded to as a branch of the equitable jurisdiction to relieve against fraud.

(*i*) See previous note; *Dent v. Bennett*, 4 My. & Cr. 269, 277, 279; Lord Kingsdown, *Smith v. Kay*, 7 H. L. C. 750, 779; *Wil-*

lms v. Bayley, L. R. 1 H. L. 200, 212, 219; Lord Penzance, *Parfitt v. Lawless*, L. R. 2 P. & M. 462, 468, 469; *Allard v. Skinner*, 36 Ch. D. 145, 183–186, 190; *Morley v. Loughnan*, 1893, 1 Ch. 736, 751, 752.

(*k*) *Williams v. Bayley*, L. R. 1 H. L. 200.

(*l*) *Allard v. Skinner*, 36 Ch. D. 145, 171, 181; *Morley v. Loughnan*, 1893, 1 Ch. 736, 751, 752.

respect to the burthen of proof. This lies, in the first class, entirely on the party who seeks to set the transaction aside (*m*). In the second, the plaintiff must show that the alleged confidential relation existed: but when this has been established, it is presumed, until the contrary be shown, that advantage was taken of it; and the obligation then lies on the defendant of proving that the plaintiff was not unduly influenced and that his consent was quite free (*n*). This class of cases is exemplified in the relation of solicitor and client (*o*), parent, or other person *in loco parentis* and child (*p*), guardian and ward (*q*), confessor or other spiritual adviser or religious superior and penitent or disciple (*r*), and doctor and patient (*s*). But the doctrine is not confined to any particular set of confidential relations. If any relation be established between the parties, of which the natural consequence would be that the one would come under the other's influence, the same rule applies, and the *onus* is on the party occupying the

Examples of relations where influence is presumed.

The doctrine not confined to any particular set of relations.

(*m*) *Blackie v. Clark*, 15 Beav. 595; *Toker v. Toker*, 31 Beav. 629, 3 De G. J. & S. 487.

(*n*) *Gibson v. Jeynes*, 6 Ves. 266, 276; *Dent v. Bennett*, 4 My. & Cr. 269, 273; *Archer v. Hudson*, 7 Beav. 551, 560; *Lyon v. Home*, L. R. 6 Eq. 655, 681; *Parfitt v. Lawless*, L. R. 2 P. & M. 462, 468, 469; *Allcard v. Skinner*, 36 Ch. D. 145, 171, 181—185.

(*o*) *Gibson v. Jeynes*, 6 Ves. 266, 276—278; *Edwards v. Meyrick*, 2 Hare, 60, 68—70; *Holman v. Loynes*, 4 De G. M. & G. 270; *Savery v. King*, 5 H. L. C. 627, 656; *Spencer v. Topham*, 22 Beav. 573, 577; *Gresley v. Mousley*, 4 De G. & J. 78; *Pisani v. A.-G. for Gibraltar*, L. R. 5 P. C. 516, 536; *Wright v. Carter*, 1903, 1 Ch. 27.

(*p*) *Archer v. Hudson*, 7 Beav. 551; *Harvey v. Mount*, 8 Beav. 439 (elder sister); *Hoghton v. Hoghton*, 15 Beav. 278, 299, 300; *Sharp v. Leach*, 31 Beav. 491 (brother

with whom a sister was living): *Savery v. King*, 5 H. L. C. 627, 655; *Turner v. Collins*, L. R. 7 Ch. 329; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Bainbrigg v. Browne*, 18 Ch. D. 188; *Powell v. Powell*, 1900, 1 Ch. 243. As to the principles on which the Court acts in setting aside or upholding family settlements or resettlements made between father and son of the family estates or property, see *Hoghton v. Hoghton*, 15 Beav. 278, 298, 300 sq.; *Hatherley*, L. C., *Turner v. Collins*, L. R. 7 Ch. 329, 339; *Fane v. Fane*, L. R. 20 Eq. 698; *Hoblyn v. Hoblyn*, 41 Ch. D. 200.

(*q*) *Hatch v. Hatch*, 9 Ves. 292.

(*r*) *Nottidge v. Prince*, 2 Giff. 246; *Lyon v. Home*, L. R. 6 Eq. 655; *Allcard v. Skinner*, 36 Ch. D. 145; *Morley v. Loughnan*, 1893, 1 Ch. 736, 752.

(*s*) *Dent v. Bennett*, 4 My. & Cr. 269, 276; *Mitchell v. Homfray*, 8 Q. B. D. 587, 589.

position of influence to prove that the other gave his unbiassed consent (*t*). It is enough, for instance, that one has taken upon himself or come to be the other's confidential adviser in business matters or the manager of his property (*u*). But there is no *presumption* of undue influence on the part of a husband in transactions between himself and his wife (*x*); though of course undue influence may in fact be exerted by a husband over his wife with respect to her making some contract intended to bind her (*y*). The equitable rules as to the avoidance of transactions induced by undue influence apply, not only to contracts and conveyances for value, but also (and of course more readily) to voluntary conveyances, settlements and gifts, when made *inter vivos* (*z*). But the presumption of undue influence from the establishment of a confidential relation between the parties has no application in the case of gifts by will; and to upset such a gift, it must be shown, not merely that the legatee solicited or put forward claims to the testator's bounty, but that the testator's volition to the contrary was overborne by the legatee's influence (*a*).

Husband and wife.

Voluntary conveyances.

Gifts by will.

(*t*) *Bridgeman v. Green*, 2 Ves. sen. 627, Wilm. 58; *Hunter v. Atkins*, 3 My. & K. 113, 136, 140, 141; *Dent v. Bennett*, 4 My. & Cr. 269, 277, 279; *Smith v. Kay*, 7 H. L. C. 750, 779; *Morley v. Loughnan*, 1893, 1 Ch. 736, 752.

(*u*) See *Huguenin v. Baseley*, 14 Ves. 273; *Hunter v. Atkins*, 3 My. & K. 113; *Tate v. Williamson*, L. R. 2 Ch. 55; *Morley v. Loughnan*, 1893, 1 Ch. 736, 752.

(*v*) *Griffith v. Cox*, 1 Ves. sen. 517, 518; *Nedby v. Nedby*, 5 De G. & Sm. 377; *Barryon v. Willis*, 1899, 2 Ch. 578, 585 (reversed on the facts, 1902, A. C. 271); *Howes v. Bishop*, 1909, 2 K. B. 390. It has been held that a fiduciary relation of the kind above mentioned may exist between a man and the woman, whom he is engaged to

marry; *Page v. Horn*, 11 Beav. 227; *Cobbett v. Brock*, 20 Beav. 524, 530; and in special circumstances between a man and a woman, with whom he has gone through a marriage ceremony, which is void, *but which she believes to be valid*; *Coulson v. Allison*, 2 De G. F. & J. 521; see *Farmer v. Farmer*, 1 H. L. C. 724, 752.

(*y*) See *Turnbull v. Duval*, 1902, A. C. 429, 432-435; *Chaples & Co., Ltd. v. Britannial*, 1908, 1 K. B. 233.

(*z*) *Huguenin v. Baseley*, 14 Ves. 273; *Alcard v. Skinner*, 36 Ch. D. 145, 171, 181 sq.; and cases cited above, pp. 841, 842.

(*a*) *Hendson v. Weatherill*, 5 De G. M. & G. 301; *Boyse v. Rosborough*, 6 H. L. C. 2, 49; *Walker v. Smith*, 29 Beav. 394;

Undue influence presumed from confidential relation on the ground of public policy.

What the duty of advising another imports.

It includes the duty of communicating facts material to the value.

Non-disclosure of these avoids the sale.

It is on the ground of public policy that contracts and conveyances are presumed to be voidable by one party, if the other occupied a position of influence over him, or were under a duty of giving him advice (*b*). As regards this duty, the person on whom it is incumbent is bound to give the other as good advice in the matter of any contract or conveyance made between them as if the transaction were carried out with some third person and not with himself. The burthen is therefore laid on him of proving that the terms of any such contract or conveyance executed in his own favour are in all respects fair and reasonable; such, in fact, as a competent adviser, acting exclusively on behalf of the other party would reasonably advise him to accept (*c*). The duty of so advising a vendor or purchaser of land includes the duty of communicating to him any circumstance known to the person bound to advise and enhancing or depreciating the value of the property (*d*); and it follows of course that the mere non-disclosure of any such circumstance is sufficient to avoid the sale (*e*). This principle is exemplified, not only in the case of a purchase by a solicitor from his client (*f*), but also where land is bought by the vendor's agent having

Hall v. Hall, L. R. 1 P. & M. 481; *Parfitt v. Lawless*, L. R. 2 P. & M. 462, 469, 470; *Baudains v. Richardson*, 1906, A. C. 169, 184, 185.

(*b*) Above, pp. 842, n. (*o*), 843, n. (*t*).

(*c*) Above, p. 842, n. (*o*).

(*d*) See *Popham v. Brooke*, 5 Russ. 8; *Edwards v. Meyrick*, 2 Hare, 60, 68—70, 74, 75; *Holman v. Lognes*, 4 De G. M. & G. 270. It was held in *Edwards v. Meyrick* that a purchase by a solicitor from his client was not avoided by the mere fact that he had not pointed out to his client, that it was possible that a railway might at some future time be made near the land sold, which would in-

crease its value, no project for making such railway being then actually on foot. It is conceived that a solicitor purchasing from his client would not be justified in concealing from him any fact known to himself which would certainly tend to increase the value of the property, as that a project was actually on foot for making a railway through or near it; and it seems immaterial that the information was not acquired in the course of his employment as that client's solicitor, but from an entirely distinct source.

(*e*) *Tate v. Williamson*, L. R. 2 Ch. 55.

(*f*) Above, p. 842.

the management of his property (*g*), or his steward (*h*), or any person who has undertaken to advise him as to his financial affairs (*i*); and where a share in a partnership business is bought from one partner by another, who knows and is aware that he knows more than the vendor about the partnership accounts (*k*). And it is further applicable in the case of a purchase by a trustee of his *cestui-que-trust's* interest in the trust property (*l*). Where a solicitor or other adviser purchases from his client for value, what he has to prove in order to maintain the transaction, is that the terms he gave were fair and reasonable, that is, as good as could have been obtained from any one else; and if this be made out, the circumstance that the client was not advised by a separate solicitor or adviser acting independently for him, will not of itself avoid the sale (*m*). But it appears that in such cases the solicitor's proper course is to insist that the client shall be so separately advised; and the fact, that he has not done this, will be weighed in connexion with the other evidence and so may tell against the validity of the sale (*n*). And a voluntary conveyance or gift by a client to his solicitor or in the solicitor's favour will not be upheld unless the client were actually so advised (*o*). If

Purchase by trustee from *cestui-que-trust*.

How far a solicitor buying from his client must see that the client has independent advice.

(*g*) *Cane v. Allen*, 2 Dow. 289, 291, 299; *Mulony v. Kerman*, 2 Dr. & War. 31.

(*h*) *Selsey v. Rhoades*, 2 S. & S. 41, 49, 1 Bligh, N. S. 1.

(*i*) *Tate v. Williamson*, L. R. 2 Ch. 55.

(*j*) *Law v. Law*, 1905, 1 Ch. 140.

(*k*) *Expte. Lovet*, 6 Ves. 625, 626; *Coles v. Trecothick*, 9 Ves. 234, 247; *Denton v. Dunner*, 23 Beav. 285, 290; *Luff v. Lord*, 34 Beav. 220, 227; Cairns, C. *Thomson v. Eastwood*, 2 App. Cas. 215, 236; *Flowerright v. Lambert*, 52 L. T. 646; *Dougan v. Macpherson*, 1902, A. C. 197, 204.

See below, Chap. XVII.

(*m*) *Edwards v. Merriick*, 2 Hare, 60; *Spencer v. Topham*, 22 Beav. 573; *Pisani v. A.-G. for Gibraltar*, L. R. 5 P. C. 516; and see cases cited above, n. (*l*), and *Cane v. Allen*, 2 Dow. 289.

(*n*) See *Harrison v. Guest*, 6 De G. M. & G. 424, 432; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Denton v. Dunner*, 23 Beav. 285, 291; *Pisani v. A.-G. for Gibraltar*, L. R. 5 P. C. 516, 540.

(*o*) *Rhodes v. Bate*, L. R. 1 Ch. 252; *Lyles v. Turry*, 1895, 2 Q. B. 679; *Barron v. Willis*, 1900, 2 Ch. 121, affirmed, 1902, A. C. 271; *Wright v. Carter*, 1903, 1 Ch. 27.

Solicitor or adviser buying from client after the relation has been severed.

Trustee so buying from *cestui-que-trust*.

Examples of the exercise of undue influence.

a solicitor or other adviser obtain information while acting as such with respect to some property of his client, and purchase the property at some time afterwards, when the relation between them has been severed, the sale is nevertheless voidable if the purchaser did not disclose the information in question (*p*). And this rule applies equally in the case of a purchase by a trustee from his *cestui-que-trust* (*q*).

The following further examples may be given of the exercise of undue influence as a ground for setting aside a sale. They appear to fall principally within the first of the above-mentioned classes of cases (*r*); but in some of them we shall observe the like presumption of undue influence and shifting of the burthen of proof as occurs in the second class. They all illustrate the generality of the rule, that a contract or conveyance is voidable in equity whenever such pressure has been used by one party to induce the other to make it that the other was not a free agent in giving his consent. It will be noticed that in some instances the conduct of the party in fault amounted or approximated to fraud. A contract has been avoided where it was procured by giving the contractor to understand that, unless he made it, his son would be prosecuted for forgery (*s*). A conveyance was set aside, which had been made under pressure of the threat of preventing the grantor from being accepted as tenant of a farm; this being a necessary condition of taking a benefit under his father's will (*t*). A sale of land was rescinded where it had been obtained

Williams v. Bayley.

Ellis v. Barker.

Sturge v. Sturge.

(*p*) *Carter v. Palmer*, 8 Cl. & Fin. 657, 705 *sq.*; *Holman v. Lymnes*, 4 De G. M. & G. 270; *Luddy's Trustee v. Peard*, 33 Ch. D. 500, 517–520.

(*q*) See cases cited above, p. 842, n. (*o*); *Clark v. Clark*, 9 App. Cas. 733, 737; *Re Boles and British*

Land Co.'s Contract, 1902, 1 Ch. 244, 247; below, Chap. XVII.

(*r*) Above, p. 841.

(*s*) *Williams v. Bayley*, L. R. 1 H. L. 200; see also *Kaufman v. Gerson*, 1904, 1 K. B. 591.

(*t*) *Ellis v. Barker*, L. R. 7 Ch. 104.

by three brothers from their eldest brother without adequate consideration, when he was under pressure for want of money, ignorant of his rights, and either without legal advice, or with advice meant to promote the interests of those with whom he was dealing. The eldest brother was in fact entitled to the whole of the land as tenant in tail, but supposed that he was only entitled to one-fourth of it; the others were aware of the true facts (*u*). So a sale will be set aside where there were such circumstances of inequality in the contracting parties' position and unfairness in the terms of the bargain that the only reasonable inference is that the one took advantage of the other's position to influence his will (*v*). Thus a sale of land obtained at a great undervalue from an aged, illiterate and weak-minded man was avoided by his heir after his death (*y*); and so was a sale made by a poor and illiterate man on terms very disadvantageous to him in his last illness and without any independent advice (*z*). And in several other cases Courts of Equity have set aside sales made at an undervalue by persons in a humble condition of life unacquainted or imperfectly acquainted with their rights or with the value of the property and acting without independent advice (*a*). So sales of an equity of redemption made by the mortgagor to the mortgagee have been avoided where there was pressure put upon the mortgagor to sell and inequality of position, coupled with undervalue (*b*); although there is no general rule, which prohibits a mortgagee from

Inequality of position between the parties, coupled with unfairness.

Longmate v. Lodge.

Clark v. Malpas.

(*u*) *Sturge v. Sturge*, 12 Beav. 229, 245; see also *Thompe v. White*, 1 Swanst. 137, 151.

(*v*) *Evans v. Llewellyn*, 1 Cox, 333, 340; *Wood v. Abrey*, 3 Madd. 417, 423.

(*y*) *Longmate v. Lodge*, 2 Giff. 157; affirmed, see 4 De G. F. & J. 402.

(*z*) *Clark v. Malpas*, 4 De G. F. & J. 401.

(*a*) *Wood v. Abrey*, 3 Madd. 417; *Baker v. Monk*, 33 Beav. 419, 4 De G. F. & J. 388; *Fry v. Lane*, 40 Ch. D. 312, 321, 322; *James v. Kerr*, ib. 449, 460; *Ross v. De Bernardy*, 1896, 2 Ch. 437, 445.

(*b*) *Ford v. Olden*, L. R. 3 Eq. 461; *Prees v. Coke*, L. R. 6 Ch. 645.

buying the equity of redemption (*c*). Where such circumstances as above mentioned of inequality of position and absence of independent advice are shown, the burthen of proof is shifted, as in the case of the establishment of a confidential relation (*d*); and it then lies on the person, who took the benefit of the sale, to make out that the terms of the transaction were in fact fair and reasonable and the other party acted freely in accepting them (*e*).

Inequality of position alone is not sufficient.

It will be observed that in all the above-mentioned cases of inequality of position between a buyer and a seller, the inadequacy of the consideration given for the sale has been a material reason for setting aside the sale. A contract of sale is not voidable merely on the ground that the parties occupied unequal positions, as that the buyer was rich and well advised and the seller was poor or in a humble way of life, or old and ill, and had no independent legal advice (*f*); although it appears that these circumstances are sufficient to cast upon the buyer the burthen of proof of fairness (*g*). In the same way, inadequacy of consideration is not of itself alone a ground for avoiding a sale; and further, if no more be proved than this, it does not appear that the party challenged is obliged to establish the fairness of his bargain (*h*). The rule of equity in this respect accords with the rule of law (*i*) and leaves the parties at

Inadequacy of consideration alone is not sufficient.

(*c*) *Knight v. Marjoribanks*, 2 Mac. & G. 10, 13, 14; *Melbourne Banking Corp. v. Brougham*, 7 App. Cas. 307, 315; above, p. 486, n. (*r*).

(*d*) Above, pp. 841, 842.

(*e*) *Baker v. Monk*, ubi sup.; *Prees v. Coke*, L. R. 6 Ch. 645, 649; *Fry v. Lane*, 40 Ch. D. 312, 322; and other cases cited in notes (*y*), (*z*), (*a*), above, p. 847.

(*f*) *Harrison v. Guest*, 6 De G. M. & G. 424, 432, 433, affirmed, 8 H. L. C. 481; *Rosher v. Wil-*

liams, L. R. 20 Eq. 210, 213, 217.

(*g*) Above, n. (*e*).

(*h*) *Griffith v. Spratley*, 1 Cox, 383; *Peacock v. Evans*, 16 Ves. 512, 517; *Wood v. Abrey*, 3 Madd. 417, 423; *Stilwell v. Wilkins*, Jac. 280, 282; *Cockell v. Taylor*, 15 Beav. 103, 115; *Harrison v. Guest*, ubi sup.

(*i*) Litt. s. 344; *Sturlyn v. Albany*, Cro. Eliz. 67; *Bolton v. Madden*, L. R. 9 Q. B. 55, 57; *Carlill v. Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256, 264, 271, 275.

liberty, if they be of full legal capacity and no constraint be put upon their wills, to make what bargain they please between themselves (*j*). But the fact that a sale was at an undervalue, is evidence from which it may be inferred that the party thereby benefited was guilty of fraud or undue influence; and where it is sought to set aside a sale on these grounds the inadequacy of the consideration given may possibly be so gross as to leave room for no other inference than that the bargain was obtained by undue influence or fraud (*k*).

It is also considered, according to the great preponderance of authority, that inadequacy of consideration is not of itself alone a good ground for resisting the specific performance of a contract for the sale of land (*l*). In this case, as in that of the rescission of the contract, undervalue is merely a matter of evidence to be weighed along with the other facts of the case. And notwithstanding that the specific performance of a contract may be refused on the ground of hardship or unfairness—reasons which are of no avail to support a claim to rescind the contract (*m*)—it is thought to be settled at the present day that, where the only evidence offered of hardship or unfairness is the inadequacy of the consideration, the Court will not withhold the remedy in question (*n*); unless the undervalue were so gross as to

Inadequacy of consideration alone no ground for resisting specific performance.

(*j*) See n. *h*, above, p. 848.

(*k*) See *Gwynne v. Heaton*, 1 Bro. C. C. 1, 9; *Underhill v. Horwood*, 10 Ves. 209, 219; *Stillwell v. Watkins*, Jac. 280, 282; *Rice v. Gordon*, 11 Beav. 265, 270; *Summers v. Griffiths*, 35 Beav. 27, 33; Lord Westbury, *Tenant v. Tennants*, L. R. 2 Sc. App. 6, 9.

(*l*) *Challier v. Brown*, 1 Cox, 428; *White v. Damon*, 7 Ves. 30, 35; *Coles v. Trecothick*, 9 Ves. 234, 246; *Racourts v. Lock*, 10 Ves. 470, 474; *Western v. Russell*, 3 V. & B. 187, 193; *Borell v. Dunn*, 2 Ha. 440, 450; *Abbott v. Swooner*, 4 De G. & Sm. 448; *Haywood v. Coppe*, 25 Beav. 140.

153. Earlier cases had proceeded on the ground that inadequacy of consideration alone was a sufficient ground for refusing to enforce specific performance; *Young v. Clerk*, Prec. Ch. 538; *Sawde v. Sawde*, 1 P. W. 745; *Day v. Newman*, 2 Cox, 77; and the earlier rule was re-asserted by Kindersley, V.-C., in *Falcke v. Gray*, 4 Drew. 651; but this case is said by Sir Edward Fry, Sp. Perf. § 445, 3rd ed., to break the current of the later authority.

(*m*) Above, pp. 768, 775.

(*n*) Fry, Sp. Perf. § 446, 3rd ed.

raise, when considered in connexion with the circumstances of the case, an irresistible inference of fraud or undue pressure (*o*).

Inadequacy
of considera-
tion on sale of
a reversion.

An exception to the rule, that mere inadequacy of consideration is no reason for setting aside or resisting specific performance of a contract, was formerly admitted in the case of the sale by private contract of estates in remainder or reversion (*p*) or other reversionary property; where the *onus* was on the purchaser to prove that he had given the fair value of the thing sold (*q*). This exception formed one branch of the jurisdiction of the Courts of Equity to set aside catching bargains made with expectant heirs or persons in a similar position (*r*). The exception was, as we have seen (*s*), abolished by statute as from the 1st of January, 1868; since when no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate is to be opened or set aside *merely on the ground of undervalue* (*t*). It is held that the effect of this statute is simply to place sales of reversionary property on the same footing, with respect to the liability of being avoided for mere inadequacy of consideration, as sales of property in possession; that the Act does not otherwise alter or affect the jurisdiction of the Court to set aside or revise catching bargains with expectant heirs or reversioners; and that undervalue is still a material element in cases where it is

o. See notes (*k*), (*l*), above, p. 849.

p. Not of course including remainders or reversions expectant only on a lease at a profitable rent.

(*q*) *Pracock v. Evans*, 16 Ves. 512; *Gorland v. De Faria*, 17 Ves. 20; *Hicksman v. Smith*, 3 Russ. 433; *Kendall v. Beckett*, 2 Russ. & My. 88, 90. This doctrine was not applied where the reversion was sold by public auc-

tion; *Shelly v. Nash*, 3 Madd. 232; nor where the reversion was sold together with the estate in possession whereon it was expectant; *Wood v. Abrey*, *ib.* 417; and see *Wardle v. Carter*, 7 Sim. 490.

(*r*) *Chesterfield v. Jausson*, 2 Ves. 125; 1 White & Tudor L. C. Eq.

(*s*) Above, p. 408.

(*t*) Stat. 31 Vict. c. 4,

sought to set aside the sale of a reversion on other grounds than that of undervalue alone; as, for instance, where the claim is based on inequality of position and absence of legal advice, coupled with unfairness in the terms of the bargain (*u*).

Contracts to sell or buy land, which have been induced by duress or undue influence, are voidable at the option of the party coerced or unduly influenced in the same manner and within the same limits as contracts induced by fraud (*x*). Thus they may be set aside either before or after completion, at suit of the availing party's trustee in bankruptcy (*y*), or his representatives after his death (*z*), as well as himself; and against the representatives after death of the other party, and all persons claiming under the transaction so voidable either as volunteers affected by (*a*) or purchasers with notice of the disabling fact (*b*). And they are equally unimpeachable against purchasers taking any interest in the land sold for value in good faith and without notice of that fact (*c*). Such contracts and

Contracts induced by duress or undue influence voidable within the same limits as those induced by fraud.

(*u*) *Aylesford v. Morris*, L. R. 8 Ch. 484, 490, 491; *O'Rourke v. Bolingbroke*, 2 App. Cas. 814, 822, 823, 833, 834; *Fry v. Lane*, 40 Ch. D. 312; *Brenchley v. Higgins*, 83 L. T. 751.

(*x*) Above, pp. 828 sq.

(*y*) *Ford v. Olden*, L. R. 3 Eq. 461.

(*z*) *Holman v. Loynes*, 4 De G. M. & G. 270; *Gresley v. Mousley*, 4 De G. & J. 78; *Plowright v. Lambert*, 52 L. T. 616. Where land has been sold under a contract voidable at the vendor's election for duress or influence, the option to set the transaction aside forms part of his real estate, as in the case of a similar contract voidable for fraud; above, p. 831; *Tomson v. Judge*, 3 Drew. 306.

(*a*) A voluntary settlement made in favour of several persons and induced, as regards one of them and the interest taken by himself alone, by undue influence is not voidable against the others; *Wright v. Carter*, 1903, 1 Ch. 27. But the case is different where a settlement is procured by the undue influence of one party in favour of himself and others, for whose benefit, as well as his own, the undue influence was exercised; see next note.

(*b*) *Hagmann v. Bascley*, 14 Ves. 273, 289; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Bainbridge v. Browne*, 18 Ch. D. 188, 197; *Morley v. Loughnan*, 1893, 1 Ch. 736, 757.

(*c*) *Blackie v. Clark*, 15 Beav. 595; *Bainbridge v. Browne*, 18 Ch. D. 188, 197.

conveyances may be affirmed either expressly or impliedly in the same manner as those induced by fraud (*d*); and long acquiescence therein may be evidence of an election to affirm them (*e*). But of course any such express confirmation must be quite free from all taint of the duress, undue influence or breach of duty which it is intended to condone (*f*); and it must not be made in ignorance of the party's right to set aside the original transaction; otherwise it will be equally voidable (*g*). Sales of land induced by duress or undue influence will be set aside, in general, on the like terms as those induced by fraud, the vendor returning the purchase money paid with interest and the purchaser giving up the land and the profits thereof received or derived by him (*h*), including an occupation rent for any land which has been in his own possession, having the like allowances made to him for necessary outgoings and substantial improvements and repairs, and being charged, where the relief is claimed against him, and in a proper case where the relief is claimed by him (*i*), with the loss caused by any acts of waste or

Terms of
setting aside
sales induce
by duress
or undue
influence.

(*d*) *Stump v. Gaby*, 2 De G. M. & G. 623; *Jarratt v. Aldam*, L. R. 9 Eq. 463.

(*e*) *Edwards v. Megrick*, 2 Hare, 60, 75; *Wright v. Vanderplank*, 8 De G. M. & G. 133; *Alford v. Skinner*, 36 Ch. D. 145, 187, 192, 193.

(*f*) *Baugh v. Price*, 1 Wils. (K. B.) 320; *Savery v. King*, 5 H. L. C. 627, 664; *Moxon v. Payne*, L. R. 8 Ch. 881, 885.

(*g*) *Baugh v. Price*, 1 Wils. (K. B.) 320, 222; *Kempson v. Ashbee*, L. R. 10 Ch. 15. It is conceived that there can be no doubt that, as a rule, knowledge of the party's rights is necessary to make an effectual confirmation. But in *Mitchell v. Homfray*, 8 Q. B. D. 587, it was in special circumstances held that a gift of money to a medical man by a patient

was confirmed by the patient's deliberate assent thereto persisted in during several years after the relation between them had been severed, although it was not proved that the patient knew that the original gift was voidable. The ground on which this judgment really rests appears to be that such assent was equivalent to a new gift made at a time when there was no confidential relation between the parties to invalidate it. It may be noted that, as the chattels given were already in the donee's possession, nothing was required to make a new gift to him but the expression of the donor's intention to give: Wms. Pers. Prop. 69, 16th ed.

(*h*) Above, pp. 834—837.

(*i*) See above, pp. 829, 836, 837.

deterioration, which he has committed (*k*). And the purchaser will not be required to account for the rents and profits on the footing of wilful default (*l*), unless a special case be made out against him (*m*), or unless he were guilty of a special breach of trust; as where he purchased when he was standing in a fiduciary relation to the vendor and concealed from the vendor some information which ought to have been communicated to him (*n*), or where the fiduciary relation was such as to incapacitate him altogether from purchasing the estate (*o*). It is thought that, where a sale is set aside for any undue influence not amounting to an actionable wrong, the party in fault is not liable to reimburse the other for any loss sustained in the nature of collateral damages and not attributable to any outlay incurred or act done in pursuance of the contract (*p*). But in the case of a sale induced by duress (such as false imprisonment, battery or menaces of loss of life or limb (*q*)), which amounts to an actual tort (*r*), it is conceived that the party so coerced can recover all damages attributable to the wrong, as in the case of fraud (*s*).

Whether purchaser accountable on the footing of wilful default.

k *Espte. Hughes*, 6 Ves. 617, 624, 625; *Espte. James*, 8 Ves. 337, 351; *Espte. Bennett*, 10 Ves. 381, 400, 401; *Robinson v. Ridley*, 6 Madd. 2; *Longmate v. Ledger*, 2 Giff. 157; *Gresley v. Mousley*, 4 De G. & J. 78, 100—102.

l See previous note.

m Above, pp. 516, 837.

n *Tate v. Williamson*, L. R. 2 Ch. 55; Seton on Judgments,

2320, 6th ed.; *Plowright v. Lambert*, 52 L. T. 646.

o *Adams v. Stander*, 2 De G. J. & S. 44; *Silkstone, &c. Co. v. Edey*, 1900, 1 Ch. 167; see below, Chap. XVII.

p See above, pp. 834, 835; and cases cited in note *k*, above.

q Above, p. 840.

r 3 Black. Comm. 120, 127.

s Above, p. 835.

CHAPTER XV.

OF ILLEGALITY IN THE CONTRACT.

There must be nothing unlawful in the object of the agreement.

Sales for illegal purposes void.
Contract for sale of land including some unlawful term.

WE have seen *(a)* that it is essential to the validity of a contract that there be nothing unlawful in the object of the agreement. A simple sale *(b)* of land is not in general affected by this condition: but there are some sales of land or other hereditaments which are expressly prohibited by statute *(c)*; and a sale of land is void, if it be made for an illegal purpose *(d)*. Again, if a contract for the sale of land include other terms besides the agreement to convey the land on payment of a price in money, and any such other term be illegal, the whole contract or the illegal part of it will be void, according as the lawful portion of the agreement be inseparable from the illegal part or not *(e)*. And if the unlawful stipulation be a part of the consideration for the conveyance of the land or payment of the price, as the case may be, the whole contract will be void *(f)*.

What contracts or stipulations are unlawful.

With regard to the question, what contracts or stipulations are unlawful, contracts for the sale of land are

(a) Above, p. 2.

(b) Above, pp. 1, 266.

(c) See below, p. 855.

(d) *Lightfoot v. Tenant*, 1 B. & P. 551, 556; *Gas Light and Coke Co. v. Turner*, 6 Bing. N. C. 324; *Fisher v. Bridges*, 3 E. & B. 642; *Smith v. White*, L. R. 1 Eq. 626; *Pearce v. Brooks*, L. R. 1 Ex. 213.

(e) *Featherston v. Hutchinson*, Cro. Eliz. 199; *Bridge v. Cage*,

Cro. Jac. 103; *Waite v. Jones*, 1 Bing. N. C. 656, 662; *Shackell v. Rosier*, 2 Bing. N. C. 631; *Keir v. Leeman*, 6 Q. B. 308, 322, 9 Q. B. 371, 395; *Hopkins v. Prescott*, 4 C. B. 578; *Lound v. Grimwade*, 39 Ch. D. 605, 613.

(f) *Mallan v. May*, 11 M. & W. 653; *Price v. Green*, 16 M. & W. 346; *Nicholls v. Stretton*, 10 Q. B. 346; *Underwood v. Barker*, 1899, 1 Ch. 300.

of course governed by the general law of contract (*g*). That can hardly be stated in full in a treatise like the present: but some examples may be given. In the first place, some contracts are particularly prohibited by statute and are void on that account. Thus the sale by auction of an advowson apart from any manor or land was made unlawful by the Benefices Act, 1898 (*h*), and is therefore void. And the sale of any land by way of lottery is expressly prohibited and made void by statute (*i*). Other contracts are infected with illegality, not as being particularly prohibited, but because they infringe some rule of law. In this way, contracts for the sale of land are void if they contemplate the commission of any act, which is illegal by common law or statute; such as a crime, an indictable offence or a civil wrong (*k*), or an act *prohibited* by statute on pain of a penalty or otherwise (*l*). A sale of a house is therefore void if made to the knowledge of both parties with the object of using it for the purpose of manufacturing counterfeit coin or banknotes, or in any manner which is a common nuisance; as a brothel, for instance (*m*), or as a common gaming or betting house or a disorderly place of entertainment (*n*); or for the purpose of carrying on there any illegal process of manufacture (*o*) or business (*p*); or for the purpose of putting it up for sale by

Contracts particularly prohibited.

Sale by auction of an advowson alone.

Sale by way of lottery.

Contracts infringing some rule of law.

Contracts contemplating an illegal act.

(*g*) See Pollock on Contract, Ch. VII., pp. 273 *sq.*, 7th ed.; Wms. Pers. Prop. 176 *sq.*, 16th ed.

(*h*) Above, p. 443.

(*i*) Stats. 10 & 11 Will. III. c. 17, s. 1; 12 Geo. II. c. 28, ss. 1, 4; *Fisher v. Bridges*, 3 E. & B. 642, 648.

(*j*) Co. Litt. 206b and n. 1; *Mitchel v. Reynolds*, 1 P. W. 181, 189; Bac. Abr. Conditions (K).

(*l*) *Bensley v. Reynolds*, 5 B. & A. 335; *Cope v. Rowlands*, 2 M. & W. 149, 157; *Taylor v. Cranland Gas Co.*, 10 Ex. 293; and see *Booth v. Bank of England*, 7 Cl. & Fin. 509, 540.

(*m*) *Lloyd v. Johnson*, 1 B. & P. 340, 341; *Smith v. White*, L. R. 1 Eq. 626; *Parce v. Brooks*, L. R. 1 Ex. 213; and see above, p. 770.

(*n*) See Stephen, Digest of Criminal Law, Art. 197, 207, 388, 408 *sq.*

(*o*) *Gas Light and Coke Co. v. Turner*, 6 Bing. N. C. 324.

(*p*) See *Cope v. Rowlands*, 2 M. & W. 149, unlicensed broker; *Taylor v. Cranland Gas Co.*, 10 Ex. 293, uncertificated conveyances; *Darus v. Mahana*, 29 Ch. D. 596, unqualified medical practitioner.

lottery (*q*). So a sale of land is void if part of the consideration be the publication of a libel (*r*) or the commission of a fraud on persons not parties to the contract (*s*), or an illegal transfer of a public office (*t*), or any stipulation which is illegal as tending to encourage immorality or as being against the policy of the law (*u*). Such are stipulations for future cohabitation (without marriage) between a man and a woman (*x*) or for stifling a criminal prosecution (*y*) for some offence, which cannot be the subject of an action for damages, or is an offence against the public (*z*); and stipulations in general restraint of marriage (*a*). And it is thought that stipulations, which are in general or unlimited restraint of alienation, are of the same kind (*b*). Here it may be

(*q*) *Fisher v. Bridges*, 3 E. & B. 642; see above, p. 855.

(*r*) *Shuckell v. Rosier*, 2 Bing. N. C. 634.

(*s*) *Mallalieu v. Hodgson*, 16 Q. B. 689; *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 499; *Scott v. Brown & Co.*, 1892, 2 Q. B. 724; *Re Myers*, 1908, 1 K. B. 941, 943.

(*t*) *Hopkins v. Prescott*, 4 C. B. 578. See Benjamin on Sales, 415, 437, 2nd ed.

(*u*) See *Egerton v. Brownlow*, 4 H. L. C. 1, 123—125, 160, 195.

(*v*) *Walker v. Perkins*, 1 W. Black. 517; *Gray v. Mathias*, 5 Ves. 286.

(*y*) *Collins v. Blantern*, 2 Wils. 341; 1 Smith L. C.; *Williams v. Bayley*, L. R. 1 H. L. 200, 213, 240; *Lound v. Grimwade*, 39 Ch. D. 605.

(*z*) *Keir v. Leeman*, 6 Q. B. 308, 321, 9 Q. B. 371, 395; *Fisher v. Apollinaris Co.*, L. R. 10 Ch. 297; *Expte. Woicerrumpton, &c. Banking Co.*, 14 Q. B. D. 32; *Windhill Local Board v. Fint*, 45 Ch. D. 351; *Jones v. Merionethshire, &c. Bdg. Socy.*, 1892, 1 Ch. 173.

(*a*) *Lowe v. Peers*, 4 Burr. 2225. As to conditions in general restraint of marriage, see an article

by the writer in L. Q. R. xii. 36.

(*b*) *Parke, B., Egerton v. Brownlow*, 4 H. L. C. 1, 125; *Hope v. Gloucester Corpn.*, 7 De G. M. & G. 647; *Re Quin*, 8 Ir. Ch. 578; *Billing v. Welch*, 1 R. 6 C. L. 88, 201; *McLean v. McKay*, L. R. 5 P. C. 327, 334, 335; *Pearson, J., Re Risher*, 26 Ch. D. 801, 810, 811, 819, 820; *Chitty, J., Re Elliot*, 1896, 2 Ch. 353, 356; but see Co. Litt. 206 b, and Mr. Smith's criticism thereon, 1 Smith, L. C. 185, 2nd ed.; 435, 11th ed. These authorities are all stated and discussed by the writer in 51 Sol. J. 648, 650, 669, 670, in an article criticising the decision of Warrington, J., in *Worthing Corpn. v. Heather*, 1906, 2 Ch. 532; see also other articles by the writer in 42 Sol. J. 628, 650, and 54 Sol. J. 501, 502, the latter criticising the decision in *South Eastern Ry. Co. v. Associated Portland, &c. Ltd.*, 1910, 1 Ch. 12. In these articles it is submitted that contracts to make some conveyance, which if actually made by way of shifting use or other executory limitation would be void as breaking the rule against perpetuities, are in general or unlimited restraint of alienation and should on that

mentioned that stipulations in unreasonable restraint of trade are *void* as being against the policy of the law (*c*): but they are not unlawful (*d*). If, therefore, such a stipulation form part of the consideration for a sale of land, it does not avoid the sale; for in such cases the Courts will enforce the stipulation so far as it may be reasonable, and reject the excess only (*d*). Contracts to buy or sell land made with the inhabitants of hostile states appear to be void, unless entered into with the king's licence. For except by royal licence all commercial intercourse between the king's subjects and the inhabitants of an enemy's country is prohibited (*e*). And this rule applies, not only to aliens, but to all persons, even to British subjects, residing in a hostile state, who are adherent to the king's enemies by carrying on business there or otherwise (*f*).

Stipulations in unreasonable restraint of trade.

Contracts made with the inhabitants of hostile states.

Sales of land are also void if they involve the offence of maintenance or champerty, or infringe the principle of legal policy on which those offences are founded, and which is intended to prevent the multiplication or stirring up of lawsuits (*g*). Here it may be mentioned that at common law, if a man were disseised of his freehold or wrongfully ejected from his leasehold land,

Sales involving maintenance or champerty.

Sale of a right of entry or action to recover land.

account be held to be void: see above, pp. 370—372, and notes (*e*), (*g*).

(*c*) See *Marin, &c. Co. v. Nordenfellt*, 1893, 1 Ch. 639, 1894, A. C. 535; *Ehrman v. Bartholomew*, 1898, 1 Ch. 671; *Underwood v. Barker*, 1899, 1 Ch. 30; *Townsend v. Jarman*, 1900, 2 Ch. 698, 702; *Bowden v. Poole*, 1904, 1 K. B. 45.

(*d*) *Mallon v. May*, 11 M. & W. 653, 669; *Green v. Price*, 13 M. & W. 695, 699; affirmed, 16 M. & W. 346, 353; and cases cited in previous note; Benjamin on Sale, 408, 2nd ed.

(*e*) See *Esposito v. Bowden*, 7

E. & B. 763, 779; *Janson v. Driefouten, &c.*, 1902, A. C. 484, 489, 502, 509; below, Chap. XVI. § 1, under the head of Aliens.

(*f*) *M'Connell v. Hector*, 3 B. & P. 113; *Roberts v. Hardy*, 3 M. & S. 533; *Albrecht v. Sassanian*, 2 V. & B. 323; *Janson v. Driefouten*, 1902, A. C. 484, 505, 506.

(*g*) *Reynell v. Sprye*, 1 De G. M. & G. 660, 677, 686; *Sprye v. Porter*, 7 E. & B. 58; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *James v. Keir*, 40 Ch. D. 449, 456; *Rees v. De Bernardy*, 1896, 2 Ch. 437, 446; *Lampel's case*, 10 Rep. 46b, 48a; Co. Litt. 214a, 265a, n. (1); *Stanley v. Jones*, 7 Bing. 369, 377.

Sale of pretended right or title.

he could not afterwards sell or dispose of his interest therein; for he was then divested of his *estate* (*h*), and had only a right of entry on the land or a right of action to recover it according to the circumstances of the case (*i*), and neither of these rights was assignable (*k*). By the Statute of Bracery (*l*) the sale was prohibited of any "pretenced rights or titles" to or in any hereditaments, unless the vendor or his predecessors in title had been in possession of the same or the reversion or remainder thereof, or in receipt of the rents and profits thereof for one whole year next before the sale was made; and any promise or covenant to have any such (*m*) right or title was equally forbidden unless the promissor or covenantor, or his predecessors, had been so in possession for a year before the contract (*n*). But persons in lawful possession of any hereditaments were permitted to buy or contract for the pretended right or title thereto of any other person (*o*). It was considered that, if a man were wrongfully held out of possession, his right of entry or action was a pretended right or title within the meaning of this Act, notwithstanding that his claim were lawful (*p*). And it appears that such a right was not assignable in equity by way of

h: Litt. §§ 450, 451, 455; Co. Litt. 214a, 266a, 267a, 345, 369a, 374b; *Goodright v. Forrester*, 8 East, 552, 566—568; 2 Prest. Abst. 388 *sq.*; *Culley v. Doe* d. *Taylerson*, 11 A. & E. 1008, 1020.

i: See 3 Black. Comm. 174 *sq.*; Wms. Real Prop. 149, 21st ed.; L. Q. R. xv. 227, 229, 230.

k: Not even, before the Wills Act, by will; above, n. (*i*); 2 Prest. Abst. 419, 420. Rights of entry are now devisable under the Wills Act, stat. 7 Will. IV. & 1 Vict. c. 26, s. 3; and see above, p. 831. The right of a copyholder wrongfully ejected was equally unassignable: *Kite and Quinton's case*, 4 Rep. 25, 26.

l: Stat. 32 Hen. VIII. c. 9, s. 2, now repealed by stat. 60 & 61

Vict. c. 65, s. 11.

m: See *Jenkins v. Jones*, 9 Q. B. D. 128, 134.

n: It was held that this Act did not prevent the sale, pending the completion of a contract for the sale of land, of the purchaser's interest in the land sold: *Wood v. Griffith*, 1 Swanst. 43, 55, 56; Sug. V. & P. 356; or the sale by an expectant devisee of his interest under the expected devise: *Cook v. Field*, 15 Q. B. 460, 471.

o: Stat. 32 Hen. VIII. c. 9, s. 4.

p: Plowd. 87, 88; *Doe* d. *Williams v. Evans*, 1 C. B. 717; *Atkins v. Jones*, 9 Q. B. D. 128, 134, 135; *Kennedy v. Lyell*, 15 Q. B. D. 491, 495.

contract dealing with it for value (*q*), according to the equitable rule established in the case of *possibilities* not assignable at law (*r*). By the Real Property Act, 1845 (*s*), a right of entry such as we are considering was made assignable by deed. It was held that, since that Act, a lawful right of entry could no longer be properly described as a pretended right or title, and might well be sold, not only to the person in possession, but to any stranger (*t*). And now, as we have seen (*u*), the enactment prohibiting the sale of pretended rights and titles has been repealed. Under the present law, therefore, a man may lawfully sell his interest in any land, of which he is wrongfully kept out of possession. And it appears that he may lawfully sell a part of his interest in such land, so long as it be no part of the bargain that the purchaser shall maintain or assist him in his suit to recover the land (*x*). The law of champerty, moreover, does not prohibit the sale *pendente lite* of any property, which is subject of an action to recover or realise it, notwithstanding that the purchaser be empowered to sue in the vendor's name and agree to indemnify him against the past and future costs of the litigation (*y*). And it seems to be equally lawful to sell a part of such property, if there be no agreement to

q *Wood v. Innes*, 18 Ves. 120; *Cholmondeley v. Clinton*, 2 J. & W. 1, 135, 136, 4 Bligh, 1, 13—45, 75, 82; *Ponsonby v. Edwards*, 1 Y. & C. 481, 496—499.

r See *Wright v. Wright*, 1 Ves. sen. 409, 411; 2 Prest. Abst. 204, 205.

s Stat. 8 & 9 Vict. c. 106, s. 6: held not to extend to right or title of entry upon a forfeiture for condition broken: *Hunt v. Bishop*, 8 Ex. 675, 680; *Hunt v. Remond*, 9 Ex. 635, 640; *Cram v. Batten*, 2 Comm. Law Rep. 1696, 23 L. T. O. S. 220; Wms. on Seisin, 125; *Jenkins v. Jones*, 9 Q. B. D. 128, 131; above, pp. 494, 495.

t *Jenkins v. Jones*, 9 Q. B. D. 128; *Kennedy v. Lyell*, 15 Q. B. D. 491, 496.

u Above, p. 858, n. 4.

v *Speyer v. Packer*, 7 E. & B. 58; *Kerr v. De Bevoise*, 1896, 2 Ch. 437, 419, 417.

y *Wood v. Griffith*, 1 Swanst. 43, 56; *Hartley v. Russell*, 2 S. & S. 244; *Harcourt v. Lord*, 2 My. & K. 590; *Hosker v. Deane*, 4 Hare, 420, 430; *Unwin v. Taylor*, 15 Beav. 103, 117; *Knight v. Boughey*, 2 De G. & J. 421, 443—445; *Mares v. United, &c. Co.*, 7 De G. M. & G. 112; *Jones v. Kerr*, 40 Ch. D. 449, 456, 457.

maintain the vendor in his suit to recover the rest (*z*). There is an exception, however, in the case of the solicitor acting in the litigation, who cannot lawfully purchase the thing sued for from his client while the action is pending (*a*); though he is permitted to take a mortgage or charge thereon by way of security for a loan (*b*).

Sales made void or unenforceable, but not prohibited.

Again, some contracts are made void or are rendered unenforceable by statute, though not prohibited. Of this kind are contracts made by way of gaming or wagering (*c*); and if any contract for the sale of land be so made, it will be void accordingly (*d*). So we have seen that contracts for the sale of land are not enforceable unless put into writing and signed by the party to be charged or his agent (*e*).

Illegal contracts are void.

Illegal contracts are altogether void; no proceedings can be maintained thereon at law or in equity; and if either party sue the other in respect thereof, the latter is at liberty to plead the illegality of the agreement as a defence (*f*). It follows that if an illegal contract be wholly or partly executed, no action can, as a rule, be maintained to recover any money paid or property transferred thereunder (*g*). Thus if land be sold for an

Property transferred thereunder cannot be recovered back.

(*z*) Above, p. 859, n. (*y*); and see *Anderson v. Radcliffe*, E. B. & E. 806. As to the question, how far this doctrine is applicable to an action to recover damages for a wrong, see Wms. Pers. Prop. 154, 16th ed.; and an article by the writer in L. Q. R. x. 143, 147 sq.; above, p. 833.

(*a*) *Simpson v. Lamb*, 7 E. & B. 84.

(*b*) *Anderson v. Radcliffe*, E. B. & E. 806.

(*c*) Stat. 8 & 9 Vict. c. 109, s. 18; *Hyams v. Stuart King*, 1908, 2 K. B. 696.

(*d*) Consider *Rourke v. Short*, 5

E. & B. 904; *Re Gieve*, 1899, 1 Q. B. 794.

(*e*) Above, pp. 3—14.

(*f*) See *Collins v. Blanton*, 2 Wils. 341; *Holman v. Johnson*, 1 Cowp. 341; cases cited above, p. 854, n. (*d*); *Taylor v. Chester*, L. R. 4 Q. B. 309; *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Herman v. Teuchner*, 15 Q. B. D. 561; *Kearley v. Thomson*, 21 Q. B. D. 742; *Scott v. Brown & Co.*, 1892, 2 Q. B. 724; *Gedge v. Royal Exchange Ass. Corp.*, 1900, 2 Q. B. 211; *Harse v. Pearl, & Co.*, 1904, 1 K. B. 558; *Re Myers*, 1108, 1 K. B. 941.

illegal purpose and the contract be completed, the vendor cannot afterwards recover the land, nor the purchaser the price; if the purchaser pay the whole or part of the price to the vendor before the land be conveyed to him, the vendor may plead the illegality of the agreement as a bar to any action by the purchaser either to compel conveyance or recover the money paid (*f*); and if the vendor convey the land without payment, he cannot get it back, or enforce payment of the price, either directly, or indirectly by suing upon any bond, covenant or note given to secure such payment (*g*). Here it may be mentioned that, where land is purchased in order to be used for an illegal purpose, the contract is only void if such purpose be known to both parties to the sale (*h*). If one contract to buy land, intending to use it for an illegal purpose but without disclosing this intention to the vendor, the purchaser cannot in this case allege his own unlawful intent in order to avoid the contract (*i*); and the contract is enforceable by the vendor. And it seems that this is equally the case, although the vendor may suspect that the purchaser intends to put the property to an unlawful use, so long as he is not actually aware of any definite intention so to use it (*k*). If the purchaser's unlawful purpose were at first unknown to the vendor, but the vendor afterwards became aware of it before completion, the contract is in effect voidable at the vendor's option; *he* may then plead the purchaser's illegal purpose as a bar to the enforcement of the contract (*l*): but the purchaser himself cannot do so.

Sale for illegal purposes known to both parties.

To one party only.

There are certain exceptions to the rule that money paid or property delivered under an unlawful agree-

Exceptions to the rule that property

(*f*) See last note.

(*g*) *Fisher v. Bradges*, 3 E. & B. 642.

(*h*) See cases cited above, pp. 854, n. *d*, 855.

(*i*) *Doe d. Roberts v. Roberts*, 2

B. & A. 367.

(*k*) See *Lloyd v. Johnson*, 1 B. & P. 340; *Prater v. Brooks*, L. R. 1 Ex. 213.

(*l*) *Cowan v. Milbourn*, L. R. 2 Ex. 230.

parted with under an illegal contract cannot be recovered.

ment cannot be recovered back. Thus if one who has paid money or delivered property under such an agreement repudiate his unlawful purpose before any part of it be accomplished, he may recover his property back; unless perhaps the object of the agreement were actually criminal or immoral (*m*). But this exception does not apply if the illegal purpose has been partly performed (*n*). And where one has made an unlawful bargain, which would (except for its illegality) be voidable by him, as if he were induced to enter into it by fraud, duress or undue influence, he may recover back any property transferred thereunder (*o*). Another exception to the rule is where it is sought to recover money paid or property transferred under a contract made void by some statute passed for the protection of a class of persons, of which the plaintiff is one (*p*). And money or property deposited with a stakeholder or other agent in order to be applied under an illegal contract may be recovered back, if notice not to part with it be given before it be actually delivered over in pursuance of the agreement (*q*).

(*m*) *Tappenden v. Randall*, 2 B. & P. 467; *Palyart v. Erckie*, 6 M. & S. 290; *Taylor v. Bowers*, 1 Q. B. D. 291; see *Hermann v. Charlesworth*, 1905, 2 K. B. 123.

(*n*) *Kearley v. Thomson*, 24 Q. B. D. 712; see *Hermann v. Charlesworth*, 1905, 2 K. B. 123.

(*o*) *Osborne v. Williams*, 18 Ves. 379; *Reynell v. Sprye*, 1 De G. M. & G. 660, 679; *Atkinson v. Denby*, 6 H. & N. 778, 7 H. & N. 934; and see *Harse v. Pearl, & Co.*, 1904, 1 K. B. 558, 563, 564; *Pollock on Contract*, 384—386, 7th ed.

(*p*) *Barclay v. Pearson*, 1893, 2 Ch. 154, 165—168; *Bonnard v. Dott*, 1906, 1 Ch. 740; *Chapman v. Michaelson*, 1908, 2 Ch. 612, 1909, 1 Ch. 238; cf. *Lodge v.*

National Union Investment Co., Ltd., 1907, 1 Ch. 300, where a plaintiff applying under the above exception for equitable relief in the way of recovery of property was put upon terms as a condition of having it restored to him. The three last cases relate to property mortgaged to an unregistered moneylender; see above, p. 487.

(*q*) *Hastelow v. Jackson*, 8 B. & C. 221; *Bow v. Ekless*, 5 H. & N. 925; *Barclay v. Pearson*, 1893, 2 Ch. 154, 168—170; *Strachan v. Universal Stock Exchange*, 1895, 2 Q. B. 329, 1896, A. C. 166; *Shoolbred v. Roberts*, 1899, 2 Q. B. 560, 1900, 2 Q. B. 497, 500; *Burge v. Ashley*, 1900, 1 Q. B. 744.

Where a contract is not prohibited by law, but is merely made void (*r*), any money paid or property transferred thereunder is in general equally irrecoverable as in the case of a prohibited contract. For the rule is that money paid or property conveyed away with a full knowledge of the facts, though under a mistake of law, cannot be recovered back (*s*). And where an agreement is made which is not prohibited, but is binding in honour only and is void at law, the one party has in general no legal remedy if the other refuse to perform his part of the agreement after having received what was due to him thereunder (*t*). Thus contracts which are illegal merely because they are made void by statute stand in effect on the same footing as contracts which are prohibited. If therefore a void agreement be wholly or partly executed, the law will leave the parties in the position in which they stand, and will not lend its aid to undo what has actually been performed (*u*). But a party to a merely void contract is at liberty to repudiate it before it be performed, and if he do this, he may recover any money or property deposited with the other party as security for his carrying out the agreement (*x*). And property transferred to a stakeholder or other agent for the purpose of being applied under a merely void contract may be recovered

Property transferred under void contracts.

(*r*) Above, p. 860.

(*s*) *Bilbie v. Lumley*, 2 East, 413; *Brisham v. Dueres*, 5 Taunt. 143; *Rogers v. Ingham*, 3 Ch. D. 351; *Kearley v. Thompson*, 24 Q. B. D. 742, 745; *Finch v. Tranter*, 1905, 1 K. B. 427; and see *Segrave v. Pickett*, ib. 715. There is an exception where money is paid under a mistake of law to an officer of the Court; *Expte. Simmonds*, 16 Q. B. D. 308; *Re Opera, Ltd.*, 1891, 2 Ch. 154; *Re Tyler*, 1907, 1 K. B. 865.

(*t*) *Fisher v. Liverpool Marine*

Insee. Co., L. R. 8 Q. B. 469, 2 Q. B. 418.

(*u*) *Manning v. Pucell*, 7 De G. M. & G. 55, 57, 63, 66; *Hampden v. Walsh*, 1 Q. B. D. 189, 192, 194; *Strachan v. Universal Stock Exchange* (No. 2), 1895, 2 Q. B. 697.

(*x*) *Hampden v. Walsh*, 1 Q. B. D. 189, 192, 194; *Trimble v. Hall*, 5 App. Cas. 342; *Barclay v. Pearson*, 1893, 2 Ch. 154, 168; *Strachan v. Universal Stock Exchange*, 1895, 2 Q. B. 329; affirmed, 1896, A. C. 166; *Strachan v. Universal Stock Exchange* (No. 2), 1895, 2 Q. B. 697, 699, 702, 705, 706.

back, if notice not to part with it be given before it be delivered over (*y*). Property transferred under a void agreement induced by misrepresentation or coercion may also be recovered; as gifts so induced are voidable (*z*). And if the contract were made void by a statute passed for the benefit of a certain class of persons, a member of the protected class may recover any property parted with in pursuance of the agreement (*a*).

Contracts un-
enforceable
under the
Statute of
Frauds.

Contracts falling within the 4th section of the Statute of Frauds (*b*) are governed by rules peculiar to themselves as regards the recovery of money paid thereunder (*c*). In such cases the contract is not made void, but is merely rendered unenforceable (*d*); the law regards the *agreement* between the parties as good (though not perfectly binding), and deems its performance to be meritorious. Thus if one buy land with notice of a prior oral sale to another, he has no equity against the other in case the oral sale be completed before he himself has obtained a conveyance (*e*). And delivery of possession upon an oral sale of land is a good consideration for a promissory note for the price (*f*). It is therefore held that, although there is in general no remedy by suing on the contract against a party who pleads the statute in bar (*g*), yet he is under an obligation *quasi ex contractu* to return money paid or to pay for work done under the agreement repudiated (*h*). Thus if the whole purchase money be paid on an oral

(*y*) See previous note; and *Diggle v. Higgs*, 2 Ex. D. 422.

(*z*) Above, p. 844; *Re Glubb*, 1900, 1 Ch. 354; and see *Harse v. Pearl, &c. Co.*, 1904, 1 K. B. 558.

(*a*) *Barclay v. Pearson*, 1893, 2 Ch. 154, 166—168; see above, p. 862, n. (*p*).

(*b*) Stat. 29 Car. II. c. 3; above, p. 3.

(*c*) See Pollock on Contract, 652, 7th ed.

(*d*) Above, p. 11.

(*e*) *Dawson v. Ellis*, 1 J. & W. 524.

(*f*) *Jones v. Jones*, 6 M. & W. 84; and see *Lavery v. Turley*, 6 H. & N. 239.

(*g*) See above, pp. 11—20.

(*h*) See *Pulbrook v. Lawes*, 1 Q. B. D. 284.

contract for the sale of land, and the vendor plead the statute as a defence to an action to enforce conveyance, the purchaser can recover the price (*i*). And where a deposit is paid on such a contract, the vendor pleading the statute is not at liberty to retain it (*k*). But the better opinion is that the purchaser repudiating the agreement under cover of the statute cannot recover the deposit from a vendor who is willing and able to complete the contract; for such a contract cannot be rescinded by either party at will, as an illegal or a void agreement may (*l*); and if one party, having paid a deposit with full knowledge that there was no writing to bind him, choose to take advantage of the Act while the other is desirous of performing the agreement, the law will not assist him to get back that payment (*m*).

It appears that, under the Mortmain Act of Geo. II. (*n*), Sale of land
for the use
of a charity. a sale of land for the use of a charity was altogether void, unless carried out with the formalities prescribed by that Act (*o*). But we have seen that, under the present Mortmain and Charitable Uses Acts of 1888 and 1891 (*p*), it is a question whether a contract to sell land to some charitable use is an *assurance* required to be made with the formalities prescribed by the Act of 1888, and therefore void, if not so made (*q*). There seems to be no doubt however that, where a sale of land to a charity is completed on payment of the purchase money by an assurance not made in compliance with these Acts, as by a deed attested by one witness only, the conveyance thereby purported to be effected is void,

(i) *Anon.*, 1 Freem. (K. B.) 486, case 664 b; Sug. V. & P. 153.

(k) *Gushell v. Archer*, 2 A. & E. 500.

(l) Above, pp. 861, 863.

(m) *Thomas v. Brown*, 1 Q. B. D. 714, dissenting from *Casson v. Roberts*, 31 Beav. 612.

(n) Stat. 9 Geo. II. c. 36.

(o) Above, pp. 449 and n. om), 457.

(p) Stats. 51 & 52 Vict. c. 42: 51 & 55 Vict. c. 73.

(q) Above, pp. 445-449, 456-459.

the assesor, if he has parted with possession, acquires a legal right of re-entry, and the purchaser has no right of action against him to recover the price (*r*). Where a man has contracted in good faith to buy land and pay for it with his own money, but directs the conveyance to be made to some charitable use, intending to give the land to the charity, and the conveyance is not made in accordance with the Mortmain Act, the assurance of the legal estate is void, and the charity has no equitable interest in the land; but in equity the land belongs to the purchaser, who has done nothing effectual to divest himself of the equitable estate which he acquired under the contract for sale (*s*).

Illegality
supervening
since the
formation of
the contract.

If the performance of a contract, which was valid in its inception, be rendered illegal by some event occurring after the formation, but before the completion of the agreement, the contract is dissolved, so far as it remains unperformed, and the parties' mutual obligations are discharged (*t*). And it appears that in such case the parties are placed in the like position as if their obligations were discharged for impossibility of performance (*u*); the law will not interfere to set aside anything actually done in pursuance of the contract; and the parties cannot recover any money paid or property transferred under their agreement during its validity (*x*).

(*r*) See above, pp. 445—449 and notes (*a*), (*l*), (*m*), 456; *Thurstan v. Nottingham, &c. Bd. Socy.*, 1902, 1 Ch. 1, 13, affirmed, 1903, A. C. 6, 10, 12; *Chapman v. Michaelson*, 1908, 2 Ch. 612, 620, 621, affirmed, 1909, 1 Ch. 238; and consider *Simpson v. Nicholls*, 3 M. & W. 240, 244, 5 M. & W. 792, and the American case of *Thompson v. Williams*, 58 N. H. 248, cited in Keener on Quasi-Contract, 270, 271.

(*s*) *Prie v. Hathaway*, 6 Madd. 304.

(*t*) *Brewster v. Kitchell*, 1 Salk. 198; *Esposito v. Bowden*, 7 E. & B. 763; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 186.

(*u*) See *Krell v. Henry*, 1903, 2 K. B. 740; *Civil Service Co-op. Socy. v. General Steam Navigation Co.*, ib. 756; *Chandler v. Webster*, 1904, 1 K. B. 493; below, Chap. XVIII. § 1.

(*x*) *Furtado v. Rodgers*, 3 B. & P. 191, 201; and see *The Teutonia*, L. R. 3 A. & E. 394, 417.

But this doctrine of illegality supervening applies only to cases where the *performance* of the primary obligation created by the contract is rendered illegal by some event, which has occurred since the formation of the agreement; it does not extend to dissolve obligations arising from *breach* of the contract (*y*). Illustrations of this doctrine occur where the performance of a contract is rendered illegal by statute passed since its formation (*z*): and where the act agreed to be done cannot be accomplished without commercial intercourse with the inhabitants of some foreign State, which was friendly when the contract was made, but has become hostile before the time stipulated for performance of the agreement (*a*).

y) See *Flinn v. Waters*, 15 East, 260, 266: note to *Clemontson v. Blossy*, 11 Ex. 145; *Janson v. Drieftaete, &c.*, 1902, A. C. 484: see also *Hanger v. Abbott*, 6 Wallace (73 U. S.), 532, 536, 537.

z) *Brewster v. Kitchell*, 1 Salk. 198; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 186.

a) *Esposito v. Bowden*, 7 E. & B. 763: see above, p. 857: and next Chapter under the head of Aliens.

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